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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DENEICE A. MAYLE, Warden, *Petitioner,*

v.

JACOBY LEE FELIX, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When a habeas petitioner challenging a state judgment amends his petition to include a new claim, does the amendment relate back to the date of the filing of his petition and thus avoid the one-year statute of limitations, 28 U.S.C. § 2244(d)(1), so long as the new claim stems from the prisoner's trial, conviction, or sentence?

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IN THE SUPREME COURT OF THE UNITED STATES

No.

DENEICE A. MAYLE, Warden, *Petitioner,*

v.

JACOBY LEE FELIX, *Respondent.*

PETITION FOR WRIT OF CERTIORARI

Petitioner Deneice A. Mayle respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit (App. A) is reported as *Felix v. Mayle*, 379 F.3d 612 (9th Cir. 2004). The district court's order is unreported. (App. B.) The magistrate judge's findings and recommendations are unreported. (App. C and App. D.)

STATEMENT OF JURISDICTION

The opinion of the Ninth Circuit was filed on August 9, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 2244 of Title 28 of the United States Code provides in pertinent part:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. . . .
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

INTRODUCTION

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") established a one-year limitations period for the filing of federal habeas corpus petitions challenging federal and state convictions and sentences. Pub. L. No. 104-132, Stat. 1214, 28 U.S.C. § 2244(d)(1), § 2255. At issue in this case is the application of that limitations period when a petitioner timely files his initial habeas petition, but then amends the petition after the limitations period has expired and adds a new and unrelated claim. Is the new claim time-barred or does it "relate back" to the original petition under Federal Rule of Civil Procedure 15(c)(2), which provides for the relation back of an amendment of a pleading when "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading"?

In its decision below, the Ninth Circuit has joined the Seventh Circuit in holding that such a new claim "relates back" to the original petition so long as the new claim stems from the prisoner's trial, conviction or sentence—which is to say,

virtually always. Six circuits have reached the opposite conclusion. This petition asks the Court to resolve this deeply entrenched circuit split.

STATEMENT OF THE CASE

Following a jury trial in Sacramento, California, Jacoby Lee Felix was found guilty of first degree murder, with the "special circumstance" that the murder occurred during the course of the robbery, and second degree robbery. Felix was sentenced to life imprisonment without the possibility of parole.

On direct appeal, Felix argued in part that admission of the extrajudicial statements of Kenneth Williams violated Felix's constitutional right to confront witnesses. (App. E.) The state's intermediate court affirmed and the state supreme court subsequently denied review. (App. E, F.) Felix's state conviction became final on August 12, 1997. (App. C10.)

On May 8, 1998, Felix filed in federal court a timely in pro per petition for writ of habeas corpus under 28 U.S.C. § 2254, which contained fully exhausted claims. (App. G) On May 29, 1998, the district court appointed the Federal Defender to represent Felix. (App. C6.) Thereafter, on August 12, 1998, the one-year statute of limitations provided by the AEDPA expired. (App. C9-10, citing 28 U.S.C. § 2244(d)(1).) On September 15, 1998, the district court directed Felix to file an amended petition. (App. H3.)

On January 28, 1999, Felix filed an amended petition, which omitted all but one of the claims in the original habeas petition. (App. I.) In Claim Two of the amended petition, Felix repeated his Confrontation Clause claim based on the trial court's admission of statements from Kenneth Williams. In Claim One of the amended petition, Felix asserted for the first time that (1) the state court violated his right to due process and his right against self-incrimination by admitting into evidence his purportedly involuntary statements to the police and (2) he

was denied effective assistance of counsel because his appellate attorney had failed to raise that claim.

Felix thereafter exhausted Claim One in state court while a motion to dismiss his "mixed" petition was pending in the federal district court. An answer to the fully exhausted amended petition was subsequently filed. (App. C7.)

The magistrate judge issued findings and recommendations which concluded that the arguments raised in Claim One were barred by AEDPA's statute of limitations. The magistrate judge rejected Claim Two on its merits. (App. C.) The magistrate judge later issued additional findings and recommendations which explained that Felix's new coerced-confession claim did not "relate back" to the timely-filed petition under Federal Rule of Civil Procedure 15(c)(2) because the claim did not arise "out of the conduct, transaction, or occurrence set forth . . . in the original pleading." (App. D5-9.) The magistrate observed that the coerced confession claim and the Confrontation Clause claim did not arise from the "same core of facts."[1/] (App. D8-9.) The district court adopted the findings and recommendations in full. (App. B.)

The Ninth Circuit Court of Appeals, in a 2-1 decision, reversed the district court's ruling that Claim One was time-barred. In applying Rule 15(c)(2) to find that Claim One related back to the originally-filed petition, the Ninth Circuit sided with *Ellzey v. United States*, 324 F.3d 521 (7th Cir. 2003), and announced that "a prisoner's new claim arises out of the same transaction or occurrence as his original petition because the transaction or occurrence in issue is his state trial and conviction." (App. A4.) The court stated that "[w]e accordingly disagree, respectfully, with the decisions of several circuits that

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1. The coerced confession claim was based on statements that Felix made to the police in October 1993, following his arrest (App. J [RT 722]); the Confrontation Clause claim was based on statements that Kenneth Williams made more than three months later. (App. J [RT 519-522, 753-755].)

deny relation back under Rule 15(c)(2) when a new claim rests on a theory or facts within a trial not raised in the original habeas petition." (App. A8.)

Responding to the other circuits' concern that its interpretation "would erode the effectiveness of AEDPA's one-year statute of limitations," the Ninth Circuit stated that the petitioner still must file his original petition within the limitations period. (App. A8.) The court also rejected the contention that its rule violates the policy of Rule 15(c) that the non-moving party have fair notice of the claims added by amendment. The court reasoned that as long as the "initial petition brought [the] trial and conviction to the attention of the State, . . . it could anticipate amendments challenging allegedly unconstitutional rulings at that trial." (App. A10.)

Judge Tallman dissented. He observed that "[b]y defining 'conduct, transaction, or occurrence' so broadly that any claim stemming from pre-trial motions, the trial, or sentencing relates back to a timely-filed habeas petition, the court obliterates AEDPA's one year statute of limitation." (App. A13.)[2/]

Judge Tallman agreed with the Fourth Circuit that the majority's approach "views 'occurrence' at too high a level of generality. . . . If we were to craft such a rule, it would mean that amendments . . . would almost invariably be allowed even after the statute of limitations has expired, because most [habeas] claims arise from a criminal defendant's underlying conviction and sentence." (App. A15, quoting *United States v. Pittman*, 209 F.3d 314, 318 (4th Cir. 2000)). The dissent also found that the majority's rule undermines the fair-notice policy underlying Rule 15(c), because the claim asserted in the original petition did not in any way provide notice of the entirely distinct claim raised in the amended petition. (App. A16-17.)

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2. While the majority opinion refers to the "conduct, transaction, or occurrence" as being the "state trial and conviction" (App. A4, 12-13), it does not dispute the dissent's charge that the holding also permits relation back of any claims arising out of pre-trial motions or sentencing.

REASONS FOR GRANTING THE PETITION

There is an acknowledged conflict over whether a new claim in an amendment filed after expiration of AEDPA's statute of limitations relates back to a timely-filed challenge to the judgment so long as the new claim arises from the prisoner's trial, conviction or sentence. This split, if not resolved, allows for disparate treatment of habeas proceedings among the circuits that have weighed in on the issue and creates uncertainty in those few circuits that have not. Certiorari is warranted to resolve this conflict.

There is no reason to delay resolution of the issue and await further dissension in the lower courts. Eight circuits have already ruled on the question presented, and the issue is an important and recurring one that concerns the core objective of the AEDPA, reducing delay and promoting finality in criminal proceedings.

In addition, the Ninth Circuit's decision is wrong on the merits. It frustrates the intent behind the AEDPA limitations period by allowing for the addition of new, unrelated and unexhausted claims after expiration of the statute of limitations. And the Ninth Circuit's decision is incompatible with the purpose or policy of Rule 15(c). The Ninth Circuit rule does not provide the non-moving party with adequate notice of new claims and effectively removes the district court's discretion in applying Rule 15(c) in habeas challenges to state convictions and sentences.[3]

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3. Prior to the AEDPA, there was no statute of limitations for habeas filings. While numerous circuit courts have determined that Rule 15(c) applies to habeas proceedings, this Court has not ruled on the matter. We assume for purposes of argument that Rule 15(c) applies.

ARGUMENT

I.

THE COURTS OF APPEAL ARE INTRACTABLY DIVIDED OVER THE QUESTION PRESENTED

As the Ninth Circuit acknowledged, its interpretation of "conduct, transaction, or occurrence" to relate back any claim stemming from the trial, conviction or sentence in a habeas proceeding is in conflict with the rulings of a majority of other circuits. (App. A8.) Six circuits—the Third, Fourth, Eighth, Tenth, Eleventh, and District of Columbia—have held that for an untimely claim to "relate back" under Rule 15(c) the untimely claim must have more in common with the timely-filed claim than the mere fact that they arose from the same trial and sentencing proceeding:

- *United States v. Hicks*, 283 F.3d 380, 389 (D.C. Cir. 2002) (new claim that government failed to prove the quantity of drugs at trial did not relate back to timely claim regarding government's willingness to grant leniency in exchange for testimony);

- *United States v. Espinoza-Saenz*, 235 F.3d 501, 505 (10th Cir. 2000) ("completely new claims of ineffective assistance of counsel" did not relate back to timely-filed claims asserting sentencing errors by court); *see also Woodward v. Williams*, 263 F.3d 1135, 1142 (10th Cir. 2001) (new claims of ineffective counsel and juror misconduct did not relate back to initial petition alleging evidentiary error);

- *Davenport v. United States*, 217 F.3d 1341, 1346 (11th Cir. 2000) (three new claims of ineffective assistance of counsel did not arise out of the same set of facts as the original claims of ineffectiveness, but arose from separate conduct and

occurrences); *see also Farris v. United States*, 333 F.3d 1211, 1215 (11th Cir. 2003) (challenge to prior conviction and claims based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000) did not relate back to pleading alleging ineffective counsel for failure to advise regarding sentencing exposure and claim regarding interpretation of sentencing guidelines);

- *United States v. Pittman*, 209 F.3d 314, 317-18 (4th Cir. 2000) (claim of ineffective assistance of counsel for failure to file a requested appeal and claim regarding an obstruction of justice enhancement did not relate back to claims that the district court lacked jurisdiction to impose enhanced sentence for prior convictions, improper enhancement for prior convictions, and government's failure to establish that the drugs at issue were crack cocaine);

- *United States v. Duffus*, 174 F.3d 333, 335-38 (3d Cir. 1999) (district court correctly denied relation back for a new claim of ineffective assistance of counsel based on counsel's failure to move to suppress evidence where timely-filed ineffectiveness claims were based on counsel's asserted failure to argue insufficient evidence on appeal and counsel's failure to object at sentencing); and

- *United States v. Craycraft*, 167 F.3d 451, 457 (8th Cir. 1999) (new claim of ineffective assistance of counsel based on counsel's failure to file an appeal did not relate back to timely-filed ineffectiveness claims based on other grounds); *see also McKay v. Puckett*, 255 F.3d 660 (8th Cir. 2001) (per curiam) (affirming dismissal of belated ineffective assistance claims based on counsel's conduct prior to conviction and sentence because they did not relate back to the original claim of state court error).[4/]

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4. Most of these cases involved challenges to a federal conviction or sentence under 28 U.S.C. § 2255. As the decision below correctly

The reasoning of those courts is exemplified by the decision in *United States v. Pittman*, 209 F.3d at 317-18, where the court stated:

> The fact that amended claims arise from the same trial and sentencing proceeding as the original motion does not mean that the amended claims relate back for purposes of Rule 15(c). If we were to craft such a rule, it would mean that amendments to a § 2255 motion would almost invariably be allowed even after the statute of limitations had expired, because most § 2255 claims arise from a criminal defendant's underlying conviction and sentence. Such a broad view of "relation back" would undermine the limitations period set by Congress in the AEDPA.

See also Davenport, 217 F.3d at 1344 (observing that *Pittman*, *Duffus*, and *Craycraft* all held that for an untimely claim to "relate back" under Rule 15(c) the untimely claim must have more in common with the timely-filed claim than the mere fact that they arose out of the same trial and sentencing proceeding).

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observed, "their reasoning applies equally to cases like Felix's that challenge state convictions under 28 U.S.C. § 2254." (App. A4 n.1; *accord*, *Woodward v. Williams*, 263 F.3d at 1142 (in applying *Espinoza-Saenz* to a state prisoner petition under 28 U.S.C. § 2254, court stated, "we see no reason to treat the issue differently.") There is no difference relevant to the question presented between the statute of limitations set forth in § 2255 ¶6 and that set forth in § 2244(d)(1). Both impose a "1-year period of limitation" to habeas applications running from the date the judgment under review became final or from three other specified dates. *See Clay v. United States*, 537 U.S. 522, 528 (2003); *United States v. Patterson*, 211 F.3d 927, 930 (5th Cir. 2000) ("the limitations provisions for § 2254 and § 2255 are 'nearly identical'"). Other courts of appeal have therefore also quite properly held that decisions involving one fully apply to the other. *See Fama v. Commissioner of Correctional Services*, 235 F.3d 804, 815-16 (2nd Cir. 2000); *United States v. Cicero*, 214 F.3d 199, 203, n* (D.C. Cir. 2000) ("Courts have generally applied the same analysis to the time limitations in § 2254 and § 2255").

By contrast, the Seventh and Ninth Circuits have held that a new claim "relates back" to the original petition so long as the new claim stems from the prisoner's trial, conviction or sentence. (*See* App. A4, A7, citing *Ellzey*, 324 F.3d at 521.) In *Ellzey*, the Seventh Circuit addressed whether added arguments based on *Apprendi v. New Jersey*, 530 U.S. 466, related back to a timely-filed § 2255 motion that included a claim that counsel's performance with respect to sentencing was subpar. *Ellzey*, 324 F.3d at 525. The court concluded that the added arguments related back, stating that "[a] prisoner who comes up with ten different ways to contest his sentence still is litigating about a single transaction or occurrence (the supposedly unlawful sentence), so an amendment necessarily relates back under Rule 15(c)(2)." *Id.* at 525-26. *Ellzey* added that "our opinion leaves in its wake a conflict among the circuits about the application of Rule 15(c)(2) to collateral attacks." *Id.* at 527.[5]

5. *Rhines v. Weber* (No. 03-9046), which is pending before this Court (124 S.Ct. 2905 (2004)), addresses the question of whether a federal district court may stay a 28 U.S.C. § 2254 petition for habeas corpus that includes exhausted and unexhausted claims when the stay is necessary to permit the prisoner to exhaust claims in state court without having his federal petition barred by AEDPA's one-year statute of limitations. Resolution of that issue does not resolve the question presented in this case and would not settle the above-noted conflict among the circuits, none of which involved the initial filing of a mixed petition.

II.

THE CIRCUIT CONFLICT IS UNTENABLE GIVEN THE IMPORTANCE OF THE QUESTION PRESENTED

The proper interpretation of the phrase "conduct, transaction or occurrence" in Rule 15(c)(2) in the habeas corpus context is vital to the effectiveness of AEDPA's statute of limitations. As the Tenth Circuit observed in *Espinoza-Saenz*, "because a majority of amendments to § 2255 motions raise issues which relate to a defendant's trial and sentencing, to allow amendment under the broad umbrella would be tantamount to judicial rescission of AEDPA's statute of limitations period." 235 F.3d at 505; *see also Pittman*, 209 F.3d at 318 (relating back claims arising from the same trial and sentencing proceeding would mean that amendments "would almost invariably be allowed even after the statute of limitations had expired").

Under the Ninth Circuit's holding, a habeas corpus petitioner who files a timely challenge to his conviction or sentence can bring future claims to challenge the conviction or sentence without ever having to worry that such future claims will be barred under the statute of limitations. This creates an incentive for prisoners to file a minimal "placeholder" petition within the statute of limitations period, thereby providing them an endless period of time in which to add new, unrelated habeas claims. The delay that can result from the Ninth Circuit's ruling, especially in capital cases, is in direct conflict with the goals of the AEDPA.

This issue is a recurring one because it is often the case that the AEDPA limitations period expires during the course of a habeas proceeding. *See Duncan v. Walker*, 533 U.S. 167, 186 (2001) (Breyer, J., dissenting). The question presented in this petition is relevant in all such cases.

III.

THE NINTH CIRCUIT'S DECISION IS WRONG ON THE MERITS

The AEDPA was designed to prevent federal habeas petitioners from unduly delaying the finality of their court judgments. *Woodford v. Garceau*, 538 U.S. 202, 206 (2003) ("Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases, . . . and 'to further the principles of comity, finality, and federalism' . . . .") (quoting *Williams v. Taylor*, 529 U.S. 420, 436 (2000)). As noted in *Duncan v. Walker*, AEDPA's one-year statute of limitations under § 2244(d)(1) "reduces the potential for delay on the road to finality," and the tolling provision of § 2244(d)(2) "provides a powerful incentive for litigants to exhaust all available state remedies before proceeding in the lower federal court." 533 U.S. at 179-80.

The Ninth Circuit applies Rule 15(c)(2) to relate back any claim that arises out of a prisoner's trial, conviction or sentence. Such an application of the rule provides an automatic bypass to the time bar for federal habeas challenges to a conviction or sentence and subverts AEDPA's one-year limitations period. The Ninth Circuit points out that the AEDPA still requires the filing of a petition within a one-year statute of limitations period. (App. A8.) That requirement, however, would no longer serve the purposes of the AEDPA (i.e., to reduce delay and to promote finality) if federal habeas proceedings could then be stalled by the addition of new—and possibly unexhausted—claims after expiration of the statute of limitations.

In the instant case, Felix filed a timely petition containing fully exhausted claims. He then filed an amendment after the statute of limitations period had expired, which contained a new, unrelated and unexhausted claim. That action delayed the federal habeas proceedings until Felix exhausted his new claim in state court. Allowing such a practice nullifies the "powerful

incentive for litigants to exhaust all available state remedies *before* proceeding in the lower federal courts." *Duncan v. Walker*, 533 U.S. at 180 (emphasis added). It also undermines the interest in finality "by creating *more potential* for delay in the adjudication of federal law claims." *Id.* (emphasis added.)

Rule 11 of the Rules Governing Section 2254 provides that the Federal Rules of Civil Procedure apply to the extent they are not inconsistent with the habeas rules. And the Advisory Committee Notes to Rule 11 of the rules governing section 2254 point out that the courts need not "rigidly apply rules [of civil procedure] which would be inconsistent or inequitable in the overall framework of habeas corpus." The Ninth Circuit's application of the phrase "conduct, transaction, or occurrence" to the habeas context runs afoul of that admonition by undermining the AEDPA limitations period.

The Ninth Circuit decision is also contrary to the structure and objectives of Rule 15(c) itself. To be sure, "the rationale of the relation back rule is to ameliorate the effect of the statute of limitations." 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure*, § 1497 (2d ed. 1990). The rule does so, however, not by shielding *all* new claims from the limitations periods, but by shielding only that narrow set of new claims arising "out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." In demarcating that narrow set, the key inquiry is "whether the opposing party has been put on notice regarding the claim or defense raised by the amended pleading. . . . A failure of notice will prevent relation back." *Id.* The Ninth Circuit's construction of Rule 15(c), however, authorizes the relation back of new claims in habeas cases even where the state had no reason to anticipate that such claims would eventually be asserted.

Because of the great variety of ways in which a habeas petitioner could challenge his state conviction or sentence, the filing of an initial habeas corpus petition to challenge a state conviction or sentence on one ground does not put the opposing

party on fair notice of all the possible claims that could be brought in the future. For example, it can hardly be said that a petition containing a single claim of instructional error gives notice of a future claim asserting that the prosecution improperly exercised a peremptory challenge against a specific juror. Thus, it is no wonder that the lack of notice has been the basis for other circuits' rejection of the broad Ninth Circuit interpretation of the "conduct, transaction, or occurrence" language of Rule 15(c)(2) in habeas proceedings. *See, e.g.*, *Hicks*, 283 F.3d at 389; *Craycraft*, 167 F.3d at 457.

The absence of fair notice under the Ninth Circuit rule is particularly acute when the new claim has not been exhausted in the state courts. These are claims that the petitioner not only failed to assert in his original federal habeas petition, but failed to assert on direct appeal and possibly one or more rounds of post-conviction review in state courts. Where, as in this case, the newly-asserted unexhausted claim is based on different facts and legal theories than those underlying the original claim, it requires a suspension of disbelief to conclude that the state had fair notice of the newly-asserted claim.

The determination of whether an amended claim relates back to an original filing under Rule 15(c) ultimately depends on the adequacy of notice and rests with the discretion of the district court. *Wilson v. Fairchild Republic Co.*, 143 F.3d 733, 738 (2d Cir. 1998); *see Mandacina v. United States*, 328 F.3d 995, 1000-01 (8th Cir. 2003). However, the rule announced by the Ninth Circuit effectively strips the lower court of its exercise of discretion in all habeas challenges to the state conviction or sentence. Under the Ninth Circuit's decision, the district court would be required to find that new claims that arise from the same trial, conviction or sentence relate back to the original petition without any consideration of whether the opposing party was put on fair notice of those claims.

Contrary to the Ninth Circuit's suggestion (App. A9), these problems are not solved by Federal Rule of Civil Procedure 15(a), which provides that a district court may deny a petitioner

leave to amend following the filing of a responsive pleading. First, a petitioner is free to amend his petition up until the time that a responsive pleading is filed. Fed. R. Civ. P. 15(a). In cases in which the district court appoints counsel, as was the case here, counsel will invariably be allowed to file an amended petition before a responsive pleading is filed. Second, and more fundamentally, the Ninth Circuit still permits district courts to grant leave to amend even when the state had not been provided with fair notice of the new claims.

At bottom, the Ninth Circuit rule would provide all prisoners challenging their conviction or sentences in federal habeas proceedings an advantage over all other civil litigants, for only habeas petitioners would receive the benefits of relation back for virtually *any* newly-asserted claim. The Ninth Circuit provides no justification for affording prisoners, who are seeking the extraordinary remedy of federal habeas relief, such preferential treatment, and none emerges from close inspection of Rule 15(c).

For these reasons, the majority of circuits that have decided the question presented have reached the correct result; the Ninth Circuit did not, and should be reversed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: October 25, 2004

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JACOBY LEE FELIX, *Petitioner-Appellant,* v. **DENEICE A. MAYLE, Warden,** *Respondent-Appellee.*	No. 02-16614 D.C. No. CV-98-00828-WBS OPINION

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, District Justice Presiding

Argued and Submitted
November 4, 2003 -- San Francisco, California
Submission Withdrawn April 13, 2004
Resubmitted July 8, 2001

Filed August 9, 2004

Before: William C. Canby. Jr., William A. Fletcher, and
Richard C. Tallman, Circuit Judges

Opinion hy Judge Canby;
Partial Concurrence and Partial Dissent by Judge Tallman

SUMMARY

Criminal Law and Procedure/Habeas Corpus

The court of appeals affirmed a judgment of the district

court in part, reversed in part, and remanded. The court held that when a habeas petitioner challenging a state conviction amends his federal petition to include a new claim, the amendment relates back to the date of filing of his petition under Federal Rule of Civil Procedure 15(c)(2), because the new claim arises out of the same transaction or occurrence as his original petition as the transaction or occurrence in issue in his state trial and conviction.

Appellant Jacoby Felix was convicted for first degree murder and second degree robbery in California state court. On appeal to the California Court of Appeal, he argued that the admission into evidence of videotaped statements of a key prosecution witness violated his Sixth Amendment right to confront the witness against him. The Court of Appeal affirmed the judgment. The California Supreme Court subsequently denied Felix's Petition for Review. Felix then filed a federal habeas corpus petition, raising the same arguments that were raised in his state appeal. Subsequent to the expiration of the Antiterrorism and Effective Death Penalty Act's (AEDPA's) one-year statute of limitations for habeas relief, Felix filed an amended petition that included the Confrontation Clause claim asserted in the original petition and an additional claim, which alleged that the state court violated his right to due process and his Fifth Amendment right against self-incrimination by admitting into evidence allegedly involuntary statement that Felix had made during a police interview. The district court accepted the recommended finding of the magistrate judge that the coerced confession claim did not relate back under Rule 15(c)(2) because it did not arise from the "same core of facts" as the Confrontation Clause claim, and was thus time-barred under AEDPA. IN addition, the district court dismissed Felix's Confrontation Clause claim on the merits.

Felix appealed.

[1] Rule 15(c) applies to federal habeas corpus cases, and provides, in part, that an amendment of a pleading relates back to the date of the original pleading when the claim or defense in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. [2] The Ninth Circuit joined with the Seventh Circuit in determining that the proper "conduct, transaction, or occurrence" in a habeas context is the trial and conviction under attack. [3] The language of Rule 15(c)(2) supported this conclusion. [4] Thus, it had to be held that the district court erred in ruling that Felix's coerced confession claim did not relate back to his initial petition under Rule 15(c)(2), and its judgment on this point had to be reversed and remanded.

[5] With regard to Felix's claim that the district court erred in dismissing his Confrontation Clause claim on the merits, the court of appeals determined that the state court's ruling on this claim was not contrary to, nor an unreasonable application of, clearly established federal law, nor did it involve an unreasonable determination of the facts. Thus, the district court's dismissal of this claim had to be affirmed.

Judge Tallman concurred in part and dissented in part, writing that by defining "conduct, transaction, or occurrence" as broadly as the majority had, so that any claim stemming from pre-trial motion, the trial, or sentencing relates back to a timely-filed habeas petition. AEDPA's one-year statute of limitation would be obliterated.

COUNSEL

David M. Porter, Assistant Federal defender, Sacramento, California, for the petitioner-appellant.

Mathew Chan, Deputy Attorney General, Sacramento, California, for the respondent-appellee.

OPINION

CANBY, Circuit Judge:

This case, in which state prisoner Jacoby Lee Felix seeks a federal writ of habeas corpus to overturn his state conviction, presents an important question of federal civil procedure that has divided other circuits. The question is this: when a habeas petitioner challenging a state conviction amends his federal petition to include a new claim, does the amendment relate back to the date of filing of his petition and thus avoid the one-year limitation of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2244(d)(1)? That question in turn depends upon the interpretation of Federal Rule of Civil Procedure 15(c)(2), which provides that an amendment relates back to the date of the original pleading when "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth . . . in the original pleading." We join the Seventh Circuit in concluding that a prisoner's new claim arises out of the same transaction or occurrence as his original petition because the transaction or occurrence in issue is his state trial and conviction. *See Ellzey v. United States*, 324 F.3d 521 (7th Cir. 2003).[1] The claim thus relates back under Rule 15(c)(2). We accordingly reverse the ruling of the district court holding Felix's claim of coerced confession to be time-barred.

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1. *Ellzey* and cases to be discussed later from other circuits that conflict with *Ellzey* arose in the context of challenges to federal convictions or sentences under 28 U.S.C. § 2255, but their reasoning applies equally to cases like Felix's that challenge state convictions under 28 U.S.C. § 2254.

Felix also argues that the district court erred in dismissing his Confrontation Clause claim on the merits. We find no error, and we accordingly affirm the district court's dismissal of the Confrontation Clause claim.

FACTUAL BACKGROUND

In 1995, Felix was convicted of first degree murder and second degree robbery in California state court. On appeal to the California Court of Appeal, he argued that the admission into evidence of videotaped statements of a key prosecution witness violated his Sixth Amendment right to confront the witnesses against him. The Court of Appeal affirmed the judgment. The California Supreme Court subsequently denied Felix's Petition for Review and his state conviction became final on August 12, 1997.

On May 8, 1998, Felix filed in federal district court a *pro se* petition for writ of habeas corpus raising the same arguments that were raised in his state appeal. AEDPA's one-year statute of limitations for habeas relief expired on August 11, 1998. On January 28, 1999, Felix filed, through counsel, an amended petition that included the Confrontation Clause claim asserted in the original petition and an additional claim, which alleged that the state court violated his right to due process and his Fifth Amendment right against self-incrimination by admitting into evidence allegedly involuntary statements that Felix had made during a police interview. The district court accepted the recommended finding of the magistrate judge that the coerced confession claim did not relate back under Rule 15(c)(2) because it did not arise from the "same core of facts" as the Confrontation Clause claim. The court accordingly held the coerced confession claim to be time-barred by AEDPA's one-year limitation.

Felix filed a timely notice of appeal and the district court issued a certificate of appealability for the coerced confession and Confrontation Clause claims. We have jurisdiction under 28 U.S.C. § 2253 and we review the district court's decision *de novo*. *See Clark v. Murphy*, 331 F.3d 1062, 1067 (9th Cir. 2003).

DISCUSSION

A

[1] Rule 15(c) applies to federal habeas corpus cases. *See Anthony v. Cambra*, 236 F.3d 568, 576 (9th Cir. 2000). That Rule provides, among other things:

> [a]n amendment of a pleading relates back to the date of the original pleading when . . . the claim or defense in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.

Fed. R. Civ. P. 15(c)(2). In other civil litigation, we have required relation-back of new claims arising from the same "conduct, transaction, or occurrence" as the claim in the original complaint, even when the new claims are based on a different legal theory of which there was no warning in the original pleading. *See Kern Oil & Ref. Co. v. Tenneco Oil Co.*, 840 F.2d 730, 736 (9th Cir. 1988). We fail to see why this literal application of Rule 15(c) should not apply to habeas corpus proceedings.

[2] The Confrontation Clause claim asserted by Felix in his original federal petition arose from the trial that ended with his conviction in state court. His coerced confession claim

arises from the same transaction—his trial and conviction in state court. Both claims assert that the conviction was tainted by unconstitutional evidence introduced at his trial. The fact that the claims differ does not mean that they arise from different occurrences. I t unduly strains the usual meaning of "conduct, transaction, or occurrence" to regard a criminal trial and conviction as a series of perhaps hundreds of individual occurrences. The Seventh Circuit explained that in such an approach:

> [e]ach step of the trial, and each legal argument, becomes a separate transaction or occurrence. Yet this is not how the phrase "conduct, transaction, or occurrence" is used in civil practice. That phrase sums up the "same transaction" approach to the law of preclusion (and thus to compulsory joinder): all legal issues and claims for relief arising out of a single transaction may (and often must) be raised together, and Rule 15(c) specifies that anything that would be barred, if not brought now, may be added and litigated.

Ellzey, 324 F.3d at 526. We agree with *Ellzey* that the proper "conduct, transaction, or occurrence" in a habeas context is the trial and conviction under attack.

[3] The language of Rule 15(c)(2) supports our conclusion. It provides for the relation back of a "claim" added by amendment if the new claim arises from the same conduct, transaction or occurrence set forth in the original pleading. A new "claim" will nearly always rest on a legal theory, and often on a subset of facts within the larger transaction or occurrence, that differs from those underlying the claim asserted by the original pleading. That is the reason that an amendment becomes necessary. But if such differences are sufficient to prevent relation back under Rule 15(c)(2), that provision of the Rule will be rendered virtually meaningless

in the habeas context.

We accordingly disagree, respectfully, with the decisions of several circuits that deny relation back under Rule 15(c)(2) when a new claim rests on a theory or facts within a trial not raised in the original habeas petition. *See United States v. Hicks*, 283 F.3d 380, 388 (D.C. Cir. 2002); *Davenport v. United States*, 217 F.3d 1341, 1344-45 (11th Cir. 2000); *United States v. Pittman*, 209 F.3d 314, 317-18 (4th Cir. 2000); *United States v. Duffus*, 174 F.3d 333, 337-38 (3rd Cir. 1999); *United States v. Craycraft*, 167 F.3d 451, 457 (8th Cir. 1999). We distinguished these cases in *Anthony*, 236 F.3d at 577, but neither endorsed nor rejected their rule because we found it unnecessary to "determine here the full scope of [Rule 15(c)(2)'s] application to amendments of habeas petitions." *Id.* at 576. Today we cannot distinguish these cases, and so we reject their rule in favor of that of *Ellzey*.

One of the concerns expressed in some of these cases and in the dissent here is that interpreting "conduct, transaction, or occurrence" in the usual, less restrictive manner would erode the effectiveness of AEDPA's one-year statute of limitations. *See, e.g., Hicks*, 283 F.3d at 388. AEDPA, however, still requires the original petition to be filed within the one-year period (with exceptions not relevant here). Giving effect to Rule 15(c)(2) does not, therefore, nullify AEDPA's one-year period.[2] On the other hand, precluding relation back of new

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2. In asserting that our decision "obliterates AEDPA's one year statute of limitation," Judge Tallman's dissent undervalues the strict requirement that the original federal habeas petition be filed within that time. The dissent also fails to take account of the very considerable incentive for a state prisoner to file all of his or her claims in the original petition or by amendment as soon thereafter as possible. If the prisoner delays, final judgment may be entered on the unamended petition, and the prisoner will almost certainly be unable to meet the strict requirements for a second

claims effectively nullifies Rule 15(c)(2) in habeas proceedings. We decline to read Rule 15(c)(2) in a way that contravenes the ordinary meaning of its language and renders it meaningless in the habeas context. As the Seventh Circuit pointed out, abuses of Rule 15 can be controlled by the district court under subsection (a), which requires leave of court to file an amendment after a responsive pleading has been filed.[3] *See* Fed. R. Civ. P. 15(a); *Ellzey*, 324 F.3d at 527.

The State argues here that, even if the usual definition is given to the term, Felix's two claims do not arise from the same "conduct, transaction, or occurrence" within the meaning of Rule 15(c)(2). The State argues that the coerced confession claim arises out of an interrogation of Felix conducted by police on October 28, 1993, while the Confrontation Clause claim is based on statements voluntarily made by a witness more than three months later. This argument, however, ignores the nature of Felix's habeas challenge. Felix is not bringing a civil action to recover damages for the alleged coercion exerted by police at the time they secured his confession, and he certainly asserts no claim based on the voluntary statement made by another person at another time. He is challenging the usual subject of a habeas petition—the custody that results from his conviction and trial. His coerced confession claim and Confrontation Clause claim assert that the Constitution was violated by the introduction of his confession and the witness's statement *at his trial*. Except for the use of these statements at his trial, Felix can state no habeas claim. We therefore reject the State's contention that we should look beyond the events of

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petition to address the additional claim. *See* 28 U.S.C. § 2244(b)(2).

3. In general, however, "leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a).

the trial to find the "conduct, transaction, or occurrence" that is the subject of Felix's claims.

We also reject the State's contention that permitting Felix's claims to relate back will frustrate the purpose of Rule 15(c)(2) to give notice to the non-moving party that such an amendment might be contemplated. It is true that, in *Anthony*, 236 F.3d at 576-77, we held that the State clearly had notice of claims sought to be added by amendment. But that was only one way of rejecting the State's argument in *Anthony* that notice beyond identity of "conduct, transaction, or occurrence" was required. We long ago rejected the argument that relation back under Rule 15(c)(2) required a "fair warning" of the amendment beyond the warning inherent in, and required by, the language of the rule. *Kern Oil*, 840 F.2d at 736. "Under Rule 15, the only question is whether the later claims arise out of the conduct, transaction, or occurrence brought to the defendant's attention by the initial claim." *Id.* Here, Felix's initial petition brought his trial and conviction to the attention of the State, and it could anticipate amendments challenging allegedly unconstitutional rulings at that trial. Rule 15(c)(2) as interpreted in *Kern Oil* requires no more.[4]

[4] We conclude, therefore, that the district court erred in ruling that Felix's coerced confession claim did not relate back to his initial petition under Rule 15(c)(2). We accordingly
reverse the district court on this point and remand for further

4. Our decision in *Ford v. Hubbard*, 330 F.3d 1086 (9th Cir. 2002), has no bearing on our ruling here because it was vacated and reversed in *Pliler v. Ford*, 2004 WL 1373174 (U.S. June 21, 2004). It therefore has no precedential effect. *See Roe v. Anderson*, 134 F.3d 1400, 1404 (9th Cir. 1998). The Supreme Court in *Pliler* declined to reach any issues of relation back under Rule 15.

proceedings with respect to that claim.[5]

B

[5] The remaining issue raised by Felix concerns his Confrontation Clause claim. He contends that the state court violated his right to confront witnesses by admitting into evidence portions of a videotaped interview given by a key prosecutorial witness, even though the witness denied any memory of the interview at trial. The circumstances indicated strongly that the witness's loss of memory was feigned. Felix argues that his right to cross-examine was effectively nullified.

Felix is entitled to relief from his state court conviction only if the state court's ruling "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or . . . was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d); *Lockyer v. Andrade*, 538 U.S. 63 (2003) (explaining AEDPA's standard). We conclude that Felix fails to meet that standard. The Supreme Court has held that the Confrontation Clause of the Sixth Amendment is not violated by the admission of a prior identification by a witness who is unable, because of memory loss, to testify concerning the basis for the identification. *United States v. Owens*, 484 U.S. 554, 564 (1988). Although *Owens* did not address the question of a witness who *feigned* memory loss, no other Supreme Court decision has addressed that point either. The

5. Our disposition of this issue renders it unnecessary for us to address in detail Felix's contention that the State waived its defense based on AEDPA's one-year limitation. Suffice it to say that, in urging the district court to rule on both the limitation and the merits, the State did not waive its limitation defense.

state court's decision that the admission of a videotaped statement of a witness who is unable, because of *feigned* memory loss, to testify concerning the basis for the statement is not contrary to nor an unreasonable application of *Owens*, nor of any other Supreme Court case.

Felix argues that the state court's ruling was contrary to *Douglas v. Alabama*, 380 U.S. 415, 419 (1965), in which the Supreme Court held that admission of a prior statement by a witness who, at trial, claimed a Fifth Amendment right not to respond, violated the Sixth Amendment. *Douglas* is distinguishable, however, because there was no way to cross-examine the witness who had invoked the Fifth Amendment on the subject. In the present case, as in *Owens*, Felix was free to cross-examine the witness on "such matters as the witness' bias, his lack of care and attentiveness, his poor eyesight, and even (what is often a prime objective of cross-examination . . .) the very fact that he has a bad memory." *Owens*, 484 U.S. at 559. The state court's ruling was not contrary to, nor an unreasonable application of, either *Owens* or *Douglas*, nor did it involve an unreasonable determination of the facts. We therefore affirm the district court's dismissal of this claim.[6]

CONCLUSION

Felix's coerced confession claim relates back under Federal Rule of Civil Procedure 15(c)(2) to his timely original petition because it arose out of the same conduct, transaction, or

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6. Our rejection of Felix's Confrontation Clause claim on the merits makes it unnecessary for us to address the State's alternative contention that Felix is seeking the benefit of a new rule that could not be applied retroactively to his case. *See Teague v. Lane*, 489 U.S. 288 (1989).

occurrence set forth in his original pleading — namely, his state trial and conviction. We reverse the district court's dismissal of that claim and remand for further proceedings with regard to it. We affirm the district court's dismissal of Felix's Confrontation Clause claim.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

TALLMAN, Circuit Judge, concurring in part and dissenting in part:

I

Today the court holds that the petitioner's newly-minted and untimely-raised coerced confession claim is saved by the "relation back" doctrine of Fed. R. Civ. P. 15(c)(2) because it "arises from the same transaction—his trial and conviction" as petitioner's timely-filed Confrontation Clause claim. By defining "conduct, transaction, or occurrence" so broadly that any claim stemming from pre-trial motions, the trial, or sentencing relates back to a timely-filed habeas petition, the court obliterates AEDPA's one year statute of limitation.

The majority of those circuits to consider the intersection of Rule 15(c) and Congress' strict statute of limitation have more narrowly interpreted "conduct, transaction, or occurrence" to mean that in order to relate back, "the untimely claim must have arisen from the 'same set of facts' as the timely filed claim, not from separate conduct or a separate occurrence in 'both time and type.' " *Davenport v. United States*, 217 F.3d 1341, 1344 (11th Cir. 2000).[1] I

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1. *Accord United States v. Hicks*, 283 F.3d 380, 389 (D.C. Cir. 2002); *United States v. Pittman*, 209 F.3d 314, 318 (9th Cir. 2000); *United*

would follow this better reasoned rule because it pays proper respect to the limitation period established by AEDPA. I thus respectfully dissent from Section A of the court's opinion. I agree with the court that the petitioner's Confrontation Clause claim fails on the merits.

II

The "relation back" doctrine is not easily applied to habeas corpus petitions. Habeas corpus litigation is, by definition, a collateral attack on the finality of a criminal judgment following direct appeal or a conscious decision to forgo direct attack. Although we have held that Rule 15 applies to habeas petitions, *Anthony v. Cambra*, 236 F.3d 568, 576 (9th Cir. 2000), we have never considered the limits of how such amendments interact with the limitation period. In doing so, we must keep in mind that by enacting strict time restrictions on the filing of habeas petitions, Congress obviously intended to expedite the processing of collateral attacks. *See United States v. Hicks*, 283 F.3d 380, 389 (D.C. Cir. 2002).

In this case, there have already been several rounds of criminal and civil collateral review at all levels of the California trial and appellate court system, which spanned three years. The petitioner timely filed his original pro se habeas petition in federal court on May 8, 1998, within the limitation period. Although well aware of the facts supporting his coerced confession claim when he filed this original petition, he waited nine months to amend it and add the new claim. Petitioner is certainly entitled to continue testing the validity of his otherwise final state first-degree murder conviction by now proceeding in federal court. But the law requires him to bring all of the claims about which he

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States v. Duffus, 174 F.3d 333, 337 (3d Cir. 1999); *United States v. Craycroft*, 167 F.3d 451, 457 (9th Cir. 1999).

clearly possesses the facts in a timely-filed habeas petition. *See United States v. Pittman*, 209 F.3d 314, 318 (4th Cir. 2000) (finding that petitioner's claims in the amended petition "were not overly technical and he could have easily included them in his original [petition]").

Rejecting this court's interpretation of "conduct, transaction, or occurrence" as too expansive, our sister circuits have observed:

> Yet this holding views "occurrence" at too high a level of generality. The fact that amended claims arise from the same trial and sentencing proceeding as the original motion does not mean that the amended claims relate back for purposes of Rule 15(c). If we were to craft such a rule, it would mean that amendments . . . would almost invariably be allowed even after the statute of limitations had expired, because most [habeas] claims arise from a criminal defendant's underlying conviction and sentence. Such a broad view of "relation back" would undermine the limitations period set by Congress in the AEDPA.

Pittman, 209 F.3d at 318.

The better rule is that enunciated by the Eleventh Circuit in *Davenport*:

> In order to relate back, the untimely claim must have arisen from the "same set of facts" as the timely filed claim, not from separate conduct or a separate occurrence in "both time and type."

217 F.3d at 1344. The whole point of enacting AEDPA was to eliminate drawn-out and unlimited collateral attacks on

criminal judgments. *See Hicks*, 283 F.3d at 389; *Pittman*, 209 F.3d at 318. In its zeal to allow this late claim to be addressed on the merits, the court invokes the "relation back" doctrine to swallow AEDPA's statute of limitation, rendering it a virtual nullity through which an unlimited number of amendments must be liberally permitted so long as the original collateral attack was timely filed.[2]

III

The court glosses over the fact that by applying the "relation back" doctrine in these circumstances, the original petition utterly failed to give fair notice to the State of the petitioner's new claim. The court relies on *Kern Oil & Refining Co. v. Tenneco Oil Co.*, 840 F.2d 730 (9th Cir. 1988), which involved a typical civil action for breach of contract and fraud, for the proposition that notice is irrelevant. However, in *Anthony v. Cambra*, 236 F.3d 568 (9th Cir. 2000), we acknowledged that the notice inquiry is indeed proper in the application of Rule 15(c) to amend habeas petitions. My colleagues unpersuasively distinguish our discussion of Rule 15(c) in *Anthony*, where we held that a petitioner's amended petition related back because each of its specific claims had been set forth in the original petition. *Id.* at 576. Relying on the guiding principle that "the touchstone of Rule 15(c) is

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2. The court states that the more narrow interpretation underestimates the incentive for a petitioner to file on time because of the possibility that the district court might rule on the petition before he files an amendment. It is the court that underestimates the amount of time required by our district judges to consider and resolve habeas petitions. This case, pending for four years and three months before entry of final judgment, is a good example. Under the court's expansive invocation of Rule 15(c), petitioner presumably could have amended his petition any number of times as long as "justice so require[d]." District courts would have difficulty ever bringing habeas cases to a close if the broad rule preferred by my colleagues is allowed to stand.

notice," we found that "it is plain that the central policy of Rule 15(c)—ensuring that the non-moving party has sufficient notice of the facts and claims giving rise to the proposed amendment—ha[d] been satisfied." *Id.* (distinguishing the results in *Duffus* and *Craycraft* because "in those cases, the courts specifically relied on the *absence* of notice to the state regarding the content of the proposed amendments as grounds for denying the motions"). Not only is the requirement of fair notice supported by our court's own precedent, this rationale has also been adopted by our sister circuits. In *Craycraft*, the Eighth Circuit relied on the lack of sufficient notice to find that an amendment did not relate back:

> Craycraft's original complaint alleged deficiencies of representation distinctly separate from the deficiency alleged in his amendments. Failing to file an appeal is a separate occurrence in both time and type from a failure to pursue a downward departure or failure to object to the type of drugs at issue. We cannot say that his original petition would provide notice of such a different sort of theory. Therefore, the amendment cannot relate back under Rule 15(c) and it must be time barred.

Id. Neither my colleagues nor the Seventh Circuit in *Ellzey v. United States*, 324 F.3d 521 (7th Cir. 2003), which the court embraces, have offered a convincing reason to deviate from "the central policy of Rule 15(c)—ensuring that the nonmoving party has sufficient notice of the facts and claims giving rise to the proposed amendment." *Anthony*, 236 F.3d at 576.

IV

In this case, the petitioner's timely-filed claim alleged that his Sixth Amendment right to confront witnesses was violated when the court admitted during his 1995 trial a

videotaped police interview of one of the State's witnesses. The petitioner's untimely claim alleges that the trial court improperly denied a pre-trial motion to suppress petitioner's incriminating statement made to police on October 28, 1993. Here, it simply cannot be said that these claims arise from the same set of facts; rather, they arise from distinctly separate occurrences of both time and type. *See Hicks*, 283 F.3d at 389 (holding that a claim that the government failed to prove the quantity of drugs at trial did not relate back to a timely-filed claim that the government's willingness to grant leniency in exchange for testimony tainted the petitioner's trial).[3/]

V

While an amendment offered to clarify or amplify the facts already alleged in support of a timely claim may relate back, an amendment that introduces a new legal theory based on facts different from those underlying the timely claim may not. *See Hicks*, 283 F.3d at 388. "These principles are

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3. *See also Davenport*, 217 F.3d at 1346 (newly offered claims of ineffective assistance of counsel did not relate back to timely-filed claims of ineffective assistance of counsel because they were raised on different sets of facts); *Pittman*, 209 F.3d at 317-18 (claims regarding obstruction of justice enhancement and failure of counsel to file an appeal did not relate back to claims that the district court lacked jurisdiction to impose an enhanced sentence and the government failed to establish by a preponderance of the evidence that the drugs at issue were crack cocaine); *Duffus*, 174 F.3d at 337-38 (claim of ineffective assistance of counsel for failing to move to suppress evidence did not relate back to claim of ineffective assistance of counsel for failing to contend on appeal that evidence was insufficient to support conviction); *Craycraft*, 167 F.3d at 457 (deficiencies of representation alleged in timely-filed petition were separate from the deficiencies alleged in the untimely amended claims because "[f]ailing to file an appeal is a separate occurrence in both time and type from a failure to pursue a downward departure or failure to object to the type of drugs at issue").

faithful both to the underlying purposes of Rule 15(c) and to the concerns about drawn-out and unlimited collateral attacks on . . . criminal judgments evinced by the passage of AEPDA. They ensure that relation back will be allowed only where the original motion provides adequate notice of the [petitioner's] claims and the proposed amendment would neither change the fundamental nature of those claims nor prejudice the [State's] defense by requiring it to prepare its case anew." *Id.* at 389.

The petitioner's original habeas petition challenging the introduction of his former co-defendant's videotaped interview was timely. "His amendments thereto were not." *Craycraft*, 167 F.3d at 456. I respectfully dissent from application of the "relation back" doctrine to preserve his amended but time-barred coerced confession claim simply because it relates to his underlying conviction and sentence.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JACOBY LEE FELIX,

Petitioner, No. CIV S-98-0828 WBS GGH P

vs.

DENEICE A. MAYLE, ORDER

Respondent.

_____/

Petitioner, a state prison represented by the Federal defender, has filed this application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On May 14, 2002, the magistrate judge filed findings and recommendations herein which were served on all parties

and which contained notice to all parties that any objections to the findings and recommendations were to be filed within twenty days. Petitioner has filed objections to the findings and recommendations, and respondent has filed a reply.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(B) and Local Rule 72-304, this court has conducted a de novo review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed May 14, 2002, are adopted in full; and

2. Claim 1 is dismissed as time barred. Claim 2 is denied on the same basis as set forth in the initial Findings

and Recommendations.

DATED: ~~July~~ 6/8, 2002.

/s/
UNITED STATES DISTRICT JUDGE

/felix828.805

APPENDIX C

FILED
Feb - 9 2001
Clerk, U.S. District Court
Eastern District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JACOBY LEE FELIX,

Petitioner, No. CIV S-98-0828 WBS GGH P

vs.

DENEICE A. MAYLE,

Respondent. FINDINGS &

_____/ RECOMMENDATIONS

I. INTRODUCTION

Petitioner is a state prisoner represented by the Federal Defender and proceeding with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his 1995 conviction for first degree murder with the special circumstance that it was committed during a robbery (Cal. Penal Code §§ 187(a) and 190.2(a)(17)); enhancement for use of a weapon (Cal. Penal Code § 12022.5); and second degree robbery (Cal. Penal Code § 211). Petitioner was sentenced to

life without the possibility of parole, plus a stayed term of five years for robbery, plus one year for use of a weapon during the crime.

II. BACKGROUND[1/]

Around 11 p.m. on the night of September 21, 1993, Lawrence Gallow and his girlfriend Paula were driving in their automobile when his car stalled near the corner of Eighth Avenue and San Jose Way in Sacramento. After ascertaining that the car was out of gas, Gallow went across the street to ask a man who was smoking a cigarette if he could give them a lift to the gas station. The man, later identified as Richard Harper, agreed.

The three of them walked over to Harper's car and Paula was just about to get in, when a man wearing a hood and a red rag over his face approached and ordered them at gunpoint to "give up the car." Gallow told Paula to "run" and fled himself, taking cover behind his own car. From there, he observed two more men, also wearing hoods on their heads and rags over their faces, approach the scene. One man, who appeared to have a handgun, walked toward Harper's car, while the third man, who was holding a big military-style weapon, stood in the middle of the intersection.

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1. The factual background is taken from the court of appeal's opinion, issued February 25, 1997. Attachment 3 to Answer. This rendition of the facts is not disputed by petitioner. The court notes with appreciation respondent's detailed recitation of the facts.

Gallow took off running and was closely pursued by the man with the big gun. He jumped over a fence and through some yards and was turning a corner when the pursuer fired at least one shot at him. He ultimately evaded his assailant and found his way home safely.

Harper also fled on foot but was not so lucky. The other robbers gave chase and shot at him several times. He was found dead in a field not far from his car, with a bullet in the back of his head.

After shooting Harper, the two robbers entered his car and drove away with the headlights turned off. That night, Harper's car was seen pulling up in the vicinity of defendant Felix's house at 11th Avenue and Santa Cruz way, followed five to ten minutes later by Felix's green Caprice. Three or four men got out of the Caprice and stood around talking while the passenger door to Harper's car remained open. Harper's car was discovered by police the next morning at the same location with a broken dashboard and wires hanging down from the steering wheel. A palm print and a fingerprint belonging to defendant Lawson were recovered from the back of Harper's car.

A month later Nathan Potts, who had been arrested for armed robbery, negotiated a deal with detectives to provide information and testimony about the Harper murder in exchange for a promise of no prison time. Potts testified that at the time of the murder he was a good friend of Lawson's, who lived upstairs from him, and was also acquainted with Felix. Early one morning, shortly after the murder, Potts was awakened by loud music playing

outside on the street. He went outside and saw Felix and Lawson standing around their cars. Felix was working on his car hooking up "some music [amplifiers, speakers, etc.]," with Lawson's assistance.[2] Lawson asked Potts if he had heard about the killing on Eighth Avenue. When Potts replied affirmatively Lawson admitted he had been involved. He said he had chased someone with a gun and fired his weapon, but was unsure if he hit anyone. Felix said that a woman might have seen him and he was "going back to smoke [shoot] her."

Some time later. Felix, who appeared very upset, told Potts that people were trying to implicate him in the murder; that he 'already had his story straight;' and that if the police contacted him he would have an alibi.

When Felix and Lawson were interviewed by police, each gave false and/or contradictory statements concerning their activities on the night of the murder.

The centerpiece of the prosecution's case was an interview given by Kenneth Williams to Police Detective Toni Winfield, who was investigating Harper's murder. The interview was transcribed and videotaped, and portions of the tape were played during Williams's [sic] testimony. Williams, who was in custody at the time on a minor unrelated matter, appeared nervous and upset, crying at the beginning of the interview

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2. Potts testified that the men were hooking up 12-inch speakers to Felix's car. Another witness, Kenneth Williams, told police he saw both defendants taking a pair of 12-inch speakers out of Harper's car.

because "I don't want to snitch on my homies [best friends]." He told Winfield that just before the robbery he overheard Felix, Lawson and a third man, Ellis Curtis,[3] planning to "jack the dude" who lived around the corner for some "weed," meaning to rob Harper to obtain marijuana.[4] Felix had an automatic weapon and Curtis had a .38 revolver.

Williams saw the three men go around the corner and about two minutes later he heard six or seven shots ring out. He then observed Curtis and Felix hop into Harper's car and drive off. Williams saw the trio a short time later going through Harper's car. Williams asked Felix whether he had shot Harper, and Felix replied, 'I think so.'

At trial, Williams consistently denied any memory of the interview with Detective Winfield, despite being shown videotape excerpts in front of the jury.

Plaintiff was convicted, along with co-defendant Lawson, on July 6, 1995. On October 19, 1995, petitioner filed a notice of appeal with the state appellate court which was denied on February 25, 1997. Attachments 1 and 3 to Answer. On approximately April 3, 1997, petitioner filed a

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3. Although the information is not readily available in the record, the Attorney General represents, without contradiction, that Curtis was convicted in a prior joint trial with Lawson and that the trial below was a retrial of Lawson, the first jury having deadlocked over Lawson's guilt.

4. Harper was known in the neighborhood as a marijuana dealer.

petition for review with the California Supreme Court.[5] Attachment 5 to Answer. That petition was denied on May 14, 1997. Attachment 6 to Answer. Petitioner filed his original pro se habeas petition with this court on May 8, 1998. On May 29, 1998, this court appointed the Federal Defender to represent petitioner. On January 28, 1999,[6] petitioner filed an amended petition, which deleted some claims and added two claims which had not been exhausted in the state court: "the state trial court violated petitioner's right to due process and against self-incrimination under the Fifth and Fourteenth Amendments by admitting into evidence petitioner's involuntary statements to police; Petitioner's right to effective assistance of counsel under the Sixth and Fourteenth Amendments was violated by his appellate counsel's failure to raise this claim on direct appeal." Am. Petition, at 2-3. Petitioner filed an exhaustion petition with

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5. This filing reflects a docketed date of April 3, 1997.

6. Petitioner filed a copy of his amended petition on February l, 1999, which additionally contained petitioner's signature.

the California Supreme Court on February 2, 1999, raising these claims. Attachment 7 to Answer. It was denied on May 26, 1999. Attachment 8 to Answer. In the meantime, respondent had filed a motion to dismiss for lack of exhaustion which was later vacated from the calendar pursuant to respondent's request after petitioner had exhausted these claims. Respondent filed an answer on September 29, 1999. Petitioner filed a traverse on January 21, 2000.

The amended petition raises the following claims: (1) "the state trial court violated petitioner's right to due process and against self-incrimination under the Fifth and Fourteenth Amendments by admitting into evidence petitioner's involuntary statements to police; Petitioner's right to effective assistance of counsel under the Sixth and Fourteenth Amendments was violated by his appellate counsel's failure to raise this claim on direct appeal;" (2) "the state rial court violated petitioner's right to confront witnesses

by admitting into evidence portions of he videotaped interrogation of Kenneth Williams who, at trial, denied any memory of the interview." Respondent, in its answer, raises the defense that the claims in ground one are barred by the statute of limitations.

After carefully reviewing the record, the court recommends that the petition be denied.

III. DISCUSSION

A. Statute of Limitations in Regard to Ground One

Petitioner's ground one involves his recorded interrogation by the police. Petitioner made no dramatic confession in his interrogation; however, he did make statements that later proved to be inconsistent with other evidence, and his demeanor during the statement could have been seen by the jury as exhibiting a consciousness of guilt. The state court suppressed the latter portion of the interrogation because of promises that the police made to petitioner to induce further inculpatory remarks. However, a

good deal of the interrogation was available for use at trial. Petitioner claims herein that the police used coercive tactics even for the first part of the interrogation, and that the entire interrogation should have been suppressed. The problem with reviewing this claim on the merits is that petitioner did not raise it until after the AEDPA statute of limitations had expired.

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA) was enacted. AEDPA amended 28 U.S.C. § 2244(d)(l) so that it now provides,

> A 1 -year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of-
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

On May 14, 1997, the California Supreme Court denied petitioner's petition for review. Respondent's Attachment 6. The finality of petitioner's conviction for AEDPA purposes was ninety days after the California Supreme Court denied his petition for review, i.e., on August 12, 1997. See Bowen v. Roe, 188 F.3d 1 157 (9th Cir. 1999). Petitioner had until August 12, 1998, i.e., one year from August 12, 1997, to file his federal petition. The amended claims, first added to the petition on January 28, 1999, are not timely.

Statutory Tolling

Section 2244(d)(2) provides that the time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or

claim is pending shall not be counted toward any period of limitation under this subsection. Petitioner filed his only state habeas petition in the California Supreme Court on February 2, 1999. Attachment 7 to Answer. Because this petition was not filed within the limitations period, it does not toll the statute.

Petitioner's original federal habeas petition also failed to toll the statute. Section 2254(d)(2) does not toll the limitations period while a federal habeas petition is pending. Jiminez v. Rice, 222 F.3d 1210, 1214 (9th Cir. 2000).

Equitable Tolling

In Calderon v. United States District Court (Beeler), 128 F.3d 1283, 1288-89 (9th Cir. 1997), overruled on other grounds, Calderon v. U.S. District Court (Kelly), 163 F.3d 530 (9th Cir. 1998), the Ninth Circuit found that the statute of limitations could be equitably tolled if extraordinary circumstances beyond a prisoner's control made it impossible to file the petition on time.

Equitable tolling will not be available in most cases because tolling should only be granted if extraordinary circumstances beyond a prisoner's control make it impossible for him to file a petition on time. As held in Beeler, "[w]e have no doubt that district judges will take seriously Congress's desire to accelerate the federal habeas process, and will only authorize extensions when this high hurdle is surmounted." 128 F.3d at 1289. "Mere excusable neglect" is insufficient as an extraordinary circumstance. Miller v. New Jersey Dept. of Corrections, 145 F.3d 6 16, 6 19 (3rd Cir. 1998). Moreover, ignorance of the law, or even illiteracy, does not constitute such extraordinary circumstances. See Hughes v. Idaho State Bd. of Corrections, 800 F.2d 905, 909 (9th Cir. 1986). Indeed, mere ignorance of the law, or pro se status, assuming one had reasonable access to discovering the law, is universally held not to be an extraordinary circumstance. Marsh v. Soares, 223 F.2d 1217, 1220 (10th Cir. 2000); Fisher v. Johnson, 174 F.3d 7 10, 714 (5th Cir.

1999); Miller, supra. Compare Whalem-Hunt v. Early, 233 F.3d 1146 (9th Cir. 2000) (en banc) (absence of pertinent legal materials from prison law library for a lengthy time within the limitations period *might* qualify as an impediment establishing equitable tolling).

Petitioner claims as justification for the tardy submission of Ground One, without declaration, that he is "untrained in the law," Traverse at 5, petitioner was truly "'on his own'" in discovering potential habeas claims, and petitioner's indigency prevented his obtaining representation. Traverse at 6. Petitioner does not assert that the law library at his institution(s) did not contain access to the pertinent law. If petitioner's reasons for equitable tolling were permitted here, the extraordinary circumstances would apply to nearly every late filing by a pro se prisoner (the vast majority of habeas applicants). Extraordinary would become routine.

Relation Back Doctrine

Having determined that the statute of limitations would

bar the belated claim, and that tolling is inappropriate, the entire issue of the propriety of the proposed addition of a claim now hinges upon the relation back doctrine of amended pleadings (Fed. R. Civ. P. 15(c)).

Fed. R. Civ. P. 15 (amendment of pleadings) applies to habeas corpus actions, including those filed after the AEDPA. Calderon v. U.S.D.C. (Taylor), 134 F.3d 981.986 (n.6) (9th Cir. 1998); Anthony v. Cambra, ___ F.3d ___, 2000 WL 1838960 (December 15, 2000). Rule 15(c)(2) provides that an amendment of a pleading relates back to the date of the original pleading when the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.

Five recent "relation back" habeas cases warrant mention. In United States v. Craycraft, 167 F.3d 451, 456-57 (8th Cir. 1999), petitioner sought to amend his petition, and his ineffective assistance of counsel claim, by adding an

additional theory of ineffective assistance. Craycraft held that theories of ineffective assistance of counsel which were distinct from previously stated theories did not relate back under Rule 15. United States v. Duffus, 174 F.3d 333, 337 (3rd Cir. 1999) followed Craycraft, and held that while it was permissible to amend to clarify a previously stated theory of ineffective assistance of counsel, a "new" theory of ineffective assistance-in this case, failure to move to suppress evidence-was distinct from previously stated theories, and would not relate back to the filing of the initial petition. These cases render persuasive examples of the propriety of "relation back" of sought amendments to habeas corpus petitions. The rationale of these cases was adopted in United States v. Pittman, 209 F.3d 314 (4th Cir. 2000). See also McClain v. Hill, 52 F. Supp. 2d 1133, 1144 (C.D.Cal. 1999) (appellate ineffective assistance claim did not relate back). A fifth and most recent relation back case, Anthony v. Cambra, ___ F.3d ___, 2000 WL 1838960 (9th Cir. December 15,

2000), is distinguishable. The Ninth Circuit allowed a claim to relate back because the policy behind Rule 15(c), notice by the non-moving party, had been satisfied. There, the original petition contained the unexhausted claim, giving notice to respondent. In this case, the original petition did not contain the new claim which was not presented to this court or to respondent until January 28, 1999, when petitioner filed an amended petition.

In this case, petitioner's only argument is that the claims in ground one relate back because they are based on the same criminal conviction and that equity requires relation back. These circumstances are not sufficient to warrant application of the relation back doctrine. The claims in ground one which concern petitioner's allegedly involuntary statements to police do not arise out of the same conduct, transaction or occurrence as the videotaped interrogation of Kenneth Williams which is the only other claim remaining.

Suspension Clause/Actual Innocence

Some courts have suggested that dismissal of actual or legal innocence claims on grounds that they are barred by the statute of limitations violates the Suspension Clause (U.S. Const. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus may not be suspended, unless when in Case of Rebellion or Invasion the public Safety may require it.")). See Rodriguez v. Artuz, 990 F. Supp. 275,283 (S.D.N.Y. 1998), affirmed, 161 F.3d 763 (2nd Cir. 1998) ("where no claim of actual or legal innocence was raised, as long as the procedural limits on habeas leave petitioners with some reasonable opportunity to have their claims heard on the merits ...[there is no] suspension of the writ.") See also United States v. Zuno-Arce, 25 F. Supp. 2d 1087, 1099-1100 (C.D.Cal. 1998), affirmed, 209 F.3d 1095 (9th Cir. 2000). Accordingly, this court considers whether petitioner's claims involve actual or legal innocence.

After reviewing the amended petition. answer, and traverse, the court finds that petitioner's newly added claims about coercive tactics at an interrogation do not sufficiently demonstrate his innocence. It is therefore recommended that ground one be dismissed as barred by the statute of limitations.

B. Ground Two - Confrontation Clause Violation

Petitioner alleges that his right to confront prosecution witness Kenneth Williams was violated because the trial court admitted a prior videotaped interrogation of Williams at trial; yet Williams denied any memory of that interview at trial. Petitioner argues that an unresponsive witness such as Williams is not subject to confrontation because the prosecution is required to read the prior statement imputed to the witness but not admitted by him, and that statement cannot be tested on cross-examination.

Introduction

This issue involves complex, sophisticated issues from

both a procedural and merits standpoint. The applicability, overlap and precedence of the Teague new rule jurisprudence is unclear after Williams (Terry) v. Taylor, 529 U.S. 362, 1205 S. Ct. 1495 (2000) (reviewing what is clearly established law and application thereof in the AEDPA context). On the merits, the determination of whether the Supreme Court law that exists on the Confrontation Clause is sufficiently specific to encompass the present situation is also vigorously disputed.

For the reasons that follow, the court finds that a ruling in favor of petitioner would constitute a new rule of law which cannot be applied on this collateral review. Even if the Teague rule would not apply, the court finds that the decisions of the state courts on this issue were not contrary to clearly established Supreme Court authority, nor were they an unreasonable application of analogous, arguably applicable Supreme Court authority.

Background

During the videotaped interview, which showed an upset Williams crying that he did not want to "snitch on [his] homies," Williams implicated petitioner in the shooting. (RT. 536-37, 535:28-36:14). Perhaps, it is best now to reiterate the short passage from the Court of Appeal concerning the videotaped statement:

> The centerpiece of the prosecution's case was an interview given by Kenneth Williams to Police Detective Toni Winfield ... Williams, who was in custody at the time on a minor unrelated matter, appeared nervous and upset, crying at the beginning of the interview because "I don't want to snitch on my homies [best friends]." He told Winfield that just before the robbery he overheard Felix, Lawson and a third man, Ellis Curtis, planning to "jack the dude" who lived around the comer for some "weed," meaning to rob Harper to obtain marijuana. Felix had an automatic weapon and Curtis had a .38 revolver. Williams saw the three men go around the corner and about two minutes later he heard six or seven shots ring out. He then observed Curtis and Felix hop into Harper's car and drive off. Williams asked Felix whether he had shot Harper, and Felix replied, 'I think so.'

Clearly, the videotape statements were critical to the prosecution's case. The prosecution brought out what was on

the videotape by asking Williams direct questions as to what he had heard or observed and also questions about what he said on the videotape. The defense objected to the showing of the videotape, based on unfair prejudice (RT. 53 1 :2, 530:5-6), defense counsel also made several objections to specific portions of the case, but those are not at issue here. The trial court overruled the initial objection. (RT. 53 1 :2). Williams testified at trial that he did not recall the interview that had just been shown to the jury. (RT. 540-41). He answered most questions with the response, "I don't recall," or "I don't remember." (RT. 540-52). Williams did testify that he did not want to get petitioner in trouble and that petitioner was his friend. (RT. 552:3-4, 535:28-36:s). For the most part, the colloquy on direct exam proceeded as follows:

> Q How long have you and Jacoby Felix been friends?
>
> A Too long.
>
> Q Too long for what?

A Long time.

Q Are you good friends with him?

A Yes.

Q Do you want to testify against him in this case?

A No.

Q Have you told me that?

A Yes.

Q One time or more than one time?

A A long time.

...

Q Are you here in court today because you want to be here?

A No. Because they ordered me back here.

Q Is that the only reason that you're in court today?

A Uh-huh.

Q You have to say yes or no -

A Yes.

(RT. 520-21).

Q And was there a - a night in September of 1993 when you were out on 8th Avenue when you heard some gunshots?

A I don't know. I don't remember.

Q Did you give a statement to a Detective Winfield in this case?

A I don't even know.

Q Have you testified about this on prior occasions?

A I don't remember. One time I did.

(RT. 524-25).

Q Did you hear Mario Lawson, Jacoby Felix and Ellis Curtis having a conversations [sic] on 8th Avenue?

A I don't remember. It was a long time ago.

MS. MCGUIRE: It's the same exhibit, your Honor. Page eleven, line fifteen through twenty-eight. Excuse me, fifteen through twenty-three.

(Videotape played.)

By MS. MCGUIRE:

Q Did you tell Detective Winfield that you were not in

the conversation, it was just them three?

A I don't know.

Q Is that you in the room with Detective Winfield?

A It looked like.

Q Did you say it was Jacoby and Mario?

A I don't know.

Q And Curtis?

A I don't know.

Q Was that you in the room with Detective Winfield?

A It looked like. I'm not looking at that tape. I don't know who that is on that tape.

Q What was the conversation they were having about?

A I don't know.

(RT. 537-38).

Q Now, Mr. Williams, do you remember telling her that the three were having a conversation about going around the corner to Jack the dude for some weed?

A I don't know.

Q Is that you in the videotape?

A I don't know.

Q What does Jack mean?

A I don't know.

Q Have you heard that phrase before?

A No.

Q You used it in the tape, didn't you?

A I don't know.

Q Did you see anybody with guns out there that day?

A No.

(RT. 539-40).

Q Did you tell Detective Winfield that Ellis Curtis had a .38?

A I don't know.

Q Is that you in the videotape?

A Yeah.

Q Did you tell her that Jacoby Felix had an automatic?

A I don't know.

Q Was that you in the videotape?

A It looked like.

Q Have you heard the word strap before?

A Huh-uh.

Q Do you know what strap means?

A No.

Q Was that you in the videotape?

A It don't know. It looked like it.

Q Detective Winfield asked you how it was you saw the guns?

A I don't remember.

Q Did you talk to Detective Winfield about how it was you saw the guns?

A I don't remember.

(RT. 540-41).

On cross examination, defense counsel for both petitioner and co-defendant Lawson questioned Williams about his prior testimony at a preliminary examination, about

his statements to police, and about the actual incident. (RT. 555-574). Throughout the entire cross-examination which covers almost twenty pages, Williams responded that he did not remember or that he did not know.

Much later, petitioner's counsel moved to strike Williams' testimony based on the Sixth Amendment's confrontation clause. Counsel complained that Williams was not available for further cross-examination, but the primary grounds for the motion was Williams' refusal to say much more than "I don't remember" when he was being cross-examined. Petitioner's trial counsel argued that Williams was effectively unavailable for cross-examination in court. The motion was denied, with the court's explanation that:

> There were transcripts of his prior testimony available to impeach him. There were statements that he had made to the detectives which were available to both the prosecution and the defense to impeach him.
>
> His failure of recollection was obviously contrived, which is why the statements that he made on those previous occasions are admissible as evidence, available for consideration by the jury.

> The jury also has to consider the affect [sic] of his attitude toward the giving of testimony and his conduct here in this Court in weighing his credibility and in determining what weight, if any, they will give to his testimony. That was very apparent. There was ample ammunition for the attorneys on both sides to use to examine Mr. Williams. And the fact that he is a hostile witness is not something that is the [sic] result in the striking of his testimony.

(RT. 1217).

In the instant case, the California Court of Appeal addressed this issue:

> [Defendants'] argument presupposes that Williams's [sic] lack of memory was genuine and not feigned, for if it was feigned, the law is well established that the interview statements would be admissible. 'Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness' [s] [sic] prior statement [citation], and the same principle governs the case of the forgetful witness.' (*People v. Green, supra*, 3 Cal.3d at p. 988.) *When a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied.* (Id. At pp. 988-989.) 'As long as there is a reasonable basis in the record for concluding that the witness's 'I don't remember' statements are evasive and untruthful, admission of his or her prior statements is proper." (*People v. Johnson* (1992) 3 Cal.4th 1183, 1219-1220.)

Defendants did not request the court make a finding that Williams was being truthful in his claimed memory loss, rendering him unavailable as a witness. (Evid. Code, § 240; see *People v. Price* (1991) 1 Cal.4th 324, 413.) Since there was no request for a judicial determination of this preliminary fact, we imply a finding Williams was not unavailable as a witness from the court's admission of his testimony. (Evid. Code, § 402, subd. (C).)

> The trial court's comments in response to defendants' motion to strike Williams's [sic] testimony show it considered his 'memory loss' to be disingenuous. [footnote omitted]. This finding has ample support in the record. Numerous times, when asked if he remembered the statements being shown in the videotape, Williams, rather than claiming memory loss, said 'I don't know.' When asked why he was telling the jury that he did not remember anything, Williams replied, 'Because I don't feel like being here period.' Significantly, one of the few admissions Williams did make during his trial testimony was that he was crying during the interview because he did not want to 'tell on them [defendants].'
>
> Substantial evidence supports the court's determination that Williams was an evasive and hostile prosecution witness. His statements at the Winfield interview were therefore properly admitted to impeach him. (*Johnson, supra*, 3 Cal.4th at pp. 1219- 1220.)

Answer, Attachment 3 at 8-9.

Applicability of Teague v. Lane's New Rule Jurisprudence

Respondent desires a rule of preclusion based on the Confrontation Clause for admission of a pretrial statement, here a videotape, of a witness who purposefully "forgets to remember" about the substance of the pretrial statement or even about the making of the statement itself.[7] Assuming that petitioner's asserted rule would be announced (or has been announced since petitioner's conviction became final (August 12, 1997)), the issue becomes whether petitioner's assertion is a "new rule," and then if so, whether this "new rule" would be applied to petitioner's conviction.

The court first finds that there is insufficient connection between 28 U.S.C. 2254(d) (AEDPA) and Teague v. Lane, 489 U.S. 288,109 S. Ct. 1060 (1989) such that the statute has

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7. Petitioner does not contest the admission of the videotape on grounds that California's hearsay rule was violated. As indicated by the Court of Appeal, a pre-trial statement made by one who feigns memory loss at trial is considered a prior inconsistent statement. See also People v. Perez, 82 Cal. App. 4th 760, 764, 98 Cal. Rptr. 2d 552, 524 (2000). A prior inconsistent statement, once admitted, is admitted for substantive as well as impeachment purposes. People v. Hawthorne, 4 Cal. 4th 43, 55 (n.4), 14 Cal. Rptr. 2d 133, 140 (1992).

superseded the case made rule. There is no doubt that the statute and the new rule jurisprudence are directed, at least in part, to the issue of retroactive application of newly stated law in collateral attacks to final convictions. Under § 2254(d), a habeas petition cannot be granted on a legal issue, or mixed factual legal issue unless the state courts' decision was contrary to clearly established law as set forth by the United States Supreme Court, or was an unreasonable application of existing law. Under Teague, a rule of law announced in a case may not be applied to a conviction defined as "final" unless that rule preexisted the finality of the conviction, or two very specific exceptions negate the general preclusion. A rule is "new" if it was not dictated by precedent, i.e., was not clearly established at the time the conviction was final. One clear difference between the statute and Teague is that under Teague a rule could be "old" by looking at all federal case law, and not just that of the Supreme Court.

Justice O'Connor, in writing for the majority of the court

nevertheless held that "the 'clearly established Federal law' phrase bears only a slight connection to our Teague jurisprudence." Williams (Terry) v. Taylor, ___U.S.___ 120 S. Ct. 1495. 1523 (2000). Nevertheless, '[w]ith one caveat, what ever would qualify as an old rule under our Teague jurisprudence will constitute 'clearly established law' ...." Id. While this court understands the two sentences apart from each other, the undersigned is unsure of how to apply Teague and the statute when viewing the sentences together. However, the Ninth Circuit has determined that the first sentence indicates that the statute and Teague should be viewed independently, Van Tran v. Lindsey, 212 F.3d 1143, 1151 (n.13) (2000). Thus, this court will conduct a Teague analysis separate from that of AEDPA. Moreover, case law previous to AEDPA holds that the Teague analysis must be performed prior to an analysis on the merits. Jones v. Gomez, 66 F.3d 199,202 (9th Cir. 1995).

Jones also supplies a good working definition of the Teague rule:

> A rule is "new" for Teague purposes if it was not "dictated by precedent existing at the time the defendant's conviction became final." Id. at ---, 113 S. Ct. at 897 (quoting Teague, 489 U.S. at 301, 109 S. Ct. at 1070). Put another way, the "question is whether a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution." Goeke v. Branch, 514 U.S. 115, ---, 115 S. Ct. 1275, 1277, 131 L.Ed.2d 152 (1995) (per curiam) (internal quotations and citations omitted).

Jones v. Gomez, 66 F.3d at 202.

The Confrontation Clause "Legal Landscape"

The legal landscape for the Supreme Court's Confrontation Clause jurisprudence is somewhat rocky from an overall viewpoint. However, the recent evolutions of the case law do not support petitioner's stance. Petitioner relies heavily on an early refusal to testify case, Douglas v. Alabama, 380 U.S. 415, 85 S. Ct. 1074 (1965). As correctly described by petitioner, Douglas involved a situation where

the defendant's accomplice refused to testify on privilege grounds. The prosecutor was then permitted to ask the defendant whether he made a certain statement in his pre-trial confession thereby getting the substance of the incriminating testimony against Douglas before the jury. The Supreme Court found that "the inference from his [the prosecutor's] reading that Loyd made the statement could not be tested by cross-examination. Similarly, Loyd could not be cross-examined on a statement imputed to but not admitted by him." Id. at 419, 85 S. Ct. at 1077.

If Douglas were the only case on the subject, petitioner would be a long way to establishing that an old rule existed which should have been applied to his case. However, the Supreme Court has withdrawn from Douglas in a substantial way. In California v. Green, 399 U.S. 149, 90 S. Ct. 1930 (1970), the Court adjudicated a situation not far removed from the facts herein. A witness' preliminary hearing statement and statement to a detective were permitted to be

used at trial, even though in the words of the state court the witness at trial had "proved to be 'markedly evasive and uncooperative on the stand.'" Id. at 151-152, 90 S. Ct. at 1931. The preliminary hearing testimony had been admitted under California's prior inconsistent statement rule-the same rule at issue here. The Supreme Court found that because the witness was at trial, and his prior preliminary hearing statement had been subject to cross-examination, the fact that he could not be cross-examined as effectively at trial was of not sufficient constitutional significance. Of course, the difference between the case here and Green is that Williams' pre-trial statement herein to the detective was not subject to cross-examination. Nevertheless, the Green court did not find the prior cross-examination to be critical. Important to the issue here, the prior statement to the police officer was also admitted for substantive purposes through the testimony of the police officer. Green commented that:

> There is a narrow question lurking in this case concerning the admissibility of Porter's statements

to Officer Wade. In the typical case to which the California court addressed itself, the witness at trial gives a version of the ultimate events different from that given on a prior occasion. In such a case, as our holding in Part II makes clear, we find little reason to distinguish among prior inconsistent statements on the basis of the circumstances under which the prior statements were given. The subsequent opportunity for cross-examination at trial with respect to both present and past versions of the event, is adequate to make equally admissible, as far as the Confrontation Clause is concerned, both the casual, off- hand remark to a stranger, and the carefully recorded testimony at a prior hearing. Here, however, Porter claimed at trial that he could not remember the events that occurred after respondent telephoned him and hence failed to give any current version of the more important events described in his earlier statement. Whether Porter's apparent lapse of memory so affected Green's right to cross-examine as to make a critical difference in the application of the Confrontation Clause in this case is an issue which is not ripe for decision at this juncture. The state court did not focus on this precise question, which was irrelevant given its broader and erroneous premise that an out-of-court statement of a witness is inadmissible as substantive evidence, whatever the nature of the opportunity to cross-examine at the trial. Nor has either party addressed itself to the question. Its resolution depends much upon the unique facts in this record, and we are reluctant to proceed without the state court's views of what the record actually discloses relevant to this particular issue. What is more, since we hold that the admission of Porter's preliminary hearing testimony

is not barred by the Sixth Amendment despite his apparent lapse of memory, the reception into evidence of the Porter statement to Officer Wade may pose a harmless-error question which is more appropriately resolved by the California courts in the first instance.

California v. Green, 399 U.S. at 168-69, 90 S. Ct. at 1940-41 (footnote 18 omitted but discussed below).

In the footnote referenced above, the Supreme Court considered the precise question at issue here to be an open one: "Even among proponents of the view that prior statements should be admissible as substantive evidence, disagreement appears to exist as to whether to apply this rule to the case of a witness who disclaims all present knowledge of the ultimate event." Justice Harlan, in concurrence, would have found no Sixth Amendment problem in this respect. Id. at 188, 90 S. Ct. at 1951. "The fact that the witness, though physically available, cannot recall either the underlying events that are the subject of an extra-judicial statement or previous testimony or recollect the circumstances under which the statement was given, does not have Sixth

Amendment consequence." Thus, the very issue to be decided here was not dictated by precedent at the time of the Green decision, despite Douglas, and the legal landscape was now looking harsh for petitioner.

In United States v. Owens, 484 U.S. 554, 108 S. Ct. 838 (1988), the Supreme Court believed its case to bring up the issue left open in Green. In this case, an out of court identification was admitted even though the witness had a complete and actual memory loss-the witness could not be cross-examined as to the substance of his identification.

> Here that question [left open in Green] is squarely presented, and we agree with the answer suggested 18 years ago by Justice Harlan. "[T]he Confrontation Clause guarantees only 'an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" [citations omitted] As Fensterer [Delaware v. Fensterer, 474 U.S. 15, 106 S. Ct. 292 (1985)] demonstrates, that opportunity is not denied when a witness testifies as to his current belief but is unable to recollect the reason for that belief. It is sufficient that the defendant has the opportunity to bring out such matters as the witness' bias, his lack of care and attentiveness, his poor eyesight, and even (what is often a prime objective of cross-examination, see 3A J. Wigmore, Evidence S 995, pp. 931-932 (J. Chadbourn rev. 1970)) the very fact that he has a bad memory.

Owens, 484 U.S. at 559, 108 S. Ct. at 842.

At this point, petitioner's presumed rule is not only "new," it does not appear to be viable at all. It hangs by the mere distinguishing thread that the memory loss in petitioner's case was purposefully caused while the memory loss in Owens occurred through natural causes. There is no significant difference from a legal standpoint. Both witnesses cannot be cross-examined on the substance of their out-of-court statements. In order for petitioner's rule to be stated, the Supreme Court would have to *now* reverse Owens and state the new rule. Of course, this cannot be accomplished in petitioner's case under Teague. At the very least, a survey of the legal landscape at the time petitioner's conviction became final reveals no "dictated by precedent" rule involving memory loss which could benefit petitioner's case.[8]

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8. Most appellate courts have had no difficulty in applying Owens. See United States v. Valdez-Soto, 31 F.3d 1467 (9th Cir. 1994).

Accordingly, petitioner's claim herein is barred by Teague.

AEDPA and Clearly Established Law

The AEDPA applies to this petition for habeas corpus which was filed after the AEDPA became effective. Neelley v. Nagle, 138 F.3d 917 (11th Cir. 1998), citing Lindh v. Murphy, 117 S. Ct. 2059 (1997). The AEDPA "worked substantial changes to the law of habeas corpus," establishing more deferential standards of review to be used by a federal habeas court in assessing a state court's adjudication of a criminal defendant's claims of constitutional error Moore v.

Nevertheless, situations arise that require distinguishing Owens such as when a witness invokes a privilege and will not answer any questions before the jury, even questions that might allow the jury to test credibility and bias. See United States v. Vargas, 933 F.2d 701 (9th Cir. 1991). See also United States v. Torrez-Ortega, 184 F.3d 1128 (10th Cir. 1999). In Torrez-Ortega, however, the court seriously misread the later Supreme Court case of White v. Illinois, 502 U.S. 346, 352-53 (n.5, 112 S. Ct. 736 (1992) as limiting Owens and repudiating the Justice Harlan concurrence in Green which the Supreme Court had just so recently adopted. Actually, White was repudiating the Justice Harlan Confrontation Clause flip-flop which he performed some months later in the case of Dutton v. Evans, 400 U.S. 74, 93-100, 91 S. Ct. 210, 221-225 (1970).

There are, of course, other Supreme Court Confrontation Clause cases in the pertinent time period, but none which so clearly outline the legal landscape as those presented in the text.

Calderon, 108 F.3d 261, 263 (9th Cir. 1997).

28 U.S.C. § 2254(d) provides,

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

In Williams (Terry) v. Taylor, 529 U.S.362, 120 S. Ct. 1495 (2000), the Supreme Court defined the operative review standard set forth in § 2254(d). Justice O'Connor's opinion for Section II of the opinion constitutes the majority opinion of the court. There is a dichotomy between "contrary to" clearly established law as enunciated by the Supreme Court, and an "unreasonable application of " that law. Id. at 1519. "Contrary to" clearly established law applies to two situations: (1) where the state court legal conclusion is

opposite that of the Supreme Court on a point of law, or (2) if the state court case is materially indistinguishable from a Supreme Court case, i.e., on point factually, yet the legal result is opposite.

"Unreasonable application" of established law, on the other hand, applies to mixed questions of law and fact, that is, the application of law to fact where there are no factually on point Supreme Court cases which mandate the result for the precise factual scenario at issue. Williams (Terry), 529 U.S. at ___, 120 S. Ct. at 1520-21 (2000). It is this prong of the AEDPA standard of review which directs deference to be paid to state court decisions. While the deference is not blindly automatic, "the most important point is that an *unreasonable* application of federal law is different from an incorrect application of law. ....[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or

incorrectly. Rather, that application must also be unreasonable." Williams (Terry), 529 U.S. at ___, 120 S. Ct. at 1522 (emphasis in original). The Supreme Court did not give a more precise definition of "unreasonableness;" however, the Ninth Circuit has determined that "unreasonable" is the equivalent of clear error in the legal context, i.e., that the state decision leaves the federal court with the clear conviction of error as opposed to the decision simply being arguably wrong. Tran v. Lindsey, 212 F.3d 1143, 1153 (9th Cir. 2000).[9/]

In reviewing petitioner's claim under AEDPA, the court seeks to determine whether the decision of the California Supreme Court, and, where appropriate, those of the lower California courts, are an unreasonable application of federal law.

Even if the court were able to get past the Teague bar,

---

9. The legal deference applies to all state courts and not just the highest state court. Of course, if a higher state court has directly spoken to the issue, this federal court would rely on the pronouncement of the higher state court.

petitioner would lose this claim upon application of AEDPA. From the above discussion, it is beyond argument that there is no clearly established law as set forth by the United States Supreme Court which could be applied to benefit petitioner. The decisions of the state courts in this case were not contrary to Supreme Court case law, nor were they unreasonably applying it. The state courts committed no error much less the clear error which must be demonstrated to overturn the state decisions. Tran v. Lindsey, supra.

VI. CONCLUSION

For the reasons stated within this opinion, IT IS HEREBY RECOMMENDED that petitioner's application for a writ of habeas corpus be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within twenty days after being served with these findings and recommendations, any party may file written objections with

the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: ~~January~~ Feb 5, 2001.

/s/
GREGORY G. HOLLOWS
UNITED STATES MAGISTRATE JUDGE

GGH:jv:kgm
feli0828.hc

United States District Court
for the
Eastern District of California
February 9, 2001

* * CERTIFICATE OF SERVICE * *

Felix 2:98-cv-00828

v.

Warden

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on February 9, 2001, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's Office, or, pursuant to prior authorization by counsel, via facsimile.

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Jack L. Wagner, Clerk

/s/
by: Deputy Clerk

APPENDIX D

FILED
May 14 2002
Clerk, U.S. District Court
Eastern District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JACOBY LEE FELIX,

Petitioner, No. CIV S-98-0828 WBS GGH P

vs.

DENEICE A. MAYLE,

Respondent. FINDINGS AND RECOMMENDATIONS

/

Introduction and Summary

On February 9,2001, the undersigned issued Findings and Recommendations on petitioner's two claims set forth in the habeas corpus petition filed on May 8, 1998. Claim 1 involved alleged involuntary statements made by petitioner to the police, and appellate counsel's alleged ineffectiveness in not raising that claim on appeal; claim 2 focused on an entirely separate claim-the alleged violation of petitioner's

confrontation rights when a videotaped interrogation of a third party was admitted during trial. The undersigned found that Claim 1 was barred by the statute of limitations, and Claim 2 should be denied on the merits.

On hearing of objections to the Findings, respondent noted that a Ninth Circuit case critical to the statute of limitations, Jiminez v. Rice, 222 F.3d 1210 (9th Cir. 2000), had been withdrawn at the time (246 F.3d 1277 (9th Cir. 2001)). Jiminez had found that the pendency of a federal habeas petition did not statutorily toll the AEDPA limitations period. Hence, petitioner's Claim 1, filed in an amended petition well after the statute of limitations had otherwise run, was time barred. The undersigned found that Claim 1 was entirely distinct from Claim 2 precluding application of the relation back doctrine, i.e., Claim 1 could not relate back to the filing of the original petition. Because at the time of hearing on objections Jiminez had been withdrawn, respondent asked the Honorable William B. Shubb to rule on

both the limitations question and the merits of Claim 1. Because Claim 1 had never been the subject of a merits determination by the undersigned, the case was referred back to the undersigned for a merits determination on Claim 1.

Soon after the remand, the United States Supreme Court determined, as had the withdrawn Jiminez case, that the pendency of a federal petition did not statutorily toll the AEDPA limitations period. Duncan v. Walker, 533 U.S. 167, 121 S. Ct. 2120 (2001). Jiminez was reinstated (276 F.3d 478 (9th Cir. 2001)). Because the entire rationale for the reference to the undersigned had been obviated by the Supreme Court decision, the undersigned asked the parties to give their views on whether the merits of Claim 1 still required a decision. Petitioner believed that respondent had "waived" the right to rely on the AEDPA limitations and thus, a merits decision was necessary; respondent believed that no merits decision was necessary.

The undersigned concludes that because the limitations

issue is so clearly decided in favor of respondent, and because constitutional issues should be avoided if there is another way to decide the case, no decision on the merits should be made.

Discussion

If the undersigned gleaned a directive from the district judge to render a decision on the merits, "no matter what," that is what the undersigned would perform. However, the district judge's comments and referral are not understood by the undersigned in such a fashion. It appears to the undersigned that if the Jiminez case had not been withdrawn, the district judge would have finally adjudicated the limitations issue. The parties and the court understood that the identical limitations issue was pending before the Supreme Court, but the date and outcome of that decision were uncertain. It made sense in the circumstances to finally adjudicate this case on the merits as well as on the procedural grounds rather than stall the disposition of the case. However, when the Supreme Court ruled fairly quickly after the remand

to the undersigned, those circumstances changed again.

One might question what is the harm in adjudicating the merits at this time. However, that question has been answered by innumerable courts which find harm in adjudicating issues of constitutional significance in the absence of a required need to do so. See Parents Involved in Community Schools v. Seattle School District, 285 F.3d 1236, 1252 (9th Cir. 2002) (looking to state law for rule of decision to avoid the constitutional issue). Petitioner's involuntary statement issue is such a question. Thus, the undersigned only reiterates below the limitations aspects of the disputed claim.

In outline form, the pertinent dates are as follows:

1. Petitioner's conviction is final - August 12, 1997 (three months after the state supreme court petition for review was denied)

2. Federal Petition (raising only Claim 2) filed - May 8, 1998

3. Counsel appointed for federal petition - May 29, 1998

4. AEDPA limitations expires - August 12, 1998

5. Amended Petition filed on January 28, 1999[1/]

6. Habeas petition filed with state supreme court - February 2, 1999

7. Exhaustion motion vacated; respondent answered on September 29, 1999

8. Traverse filed January 21, 2000.

No one contends that the limitations period expiration is incorrectly calculated, or that the belated state petition, belated because it was filed after the limitations period had expired, somehow retroactively tolled the limitations period. And, for the reasons discussed in the initial Findings, and summarized below, equitable tolling is not possible under the facts. The key issue involves application of the relation back

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1. Petitioner filed the amended petition with unexhausted Claim 1 prior to the time it had been placed before the state supreme court. Nevertheless, when the state supreme court issued its ruling on the claim prior to the time this court heard the exhaustion motion, the exhaustion issue was mooted.

doctrine of Fed. R. Civ. P. 15(c), a doctrine universally held to be applicable to habeas corpus actions. Anthony v. Cambra, 236 F.3d 568, 574 (9th Cir.2000).

All circuits to rule on the issue have held that new claims, pled for the first time in an amended petition, not arising from the same core of operative facts as the claims timely pled, do not relate back, and are AEDPA barred. United States v. Hicks, 283 F.3d 380 (D.C. Cir. 2002) (Apprendi claim did not relate back to original petition alleging a due process witness issue)[2/]; Dean v. United States, 278 F.3d 1218 (11th Cir. 2002) ("Congress did not intend Rule 15(c) to be so broad as to allow an amended pleading to add an entirely new claim based on a different set of facts"); Newell v. Hanks, 283 F.3d 827 (7th Cir. 2002) (stating the rule that no relation back can occur in the absence of a new claim based on the same core of facts advanced in the initial petition, but finding the amended petition nearly identical to

---

2. For AEDPA limitations purposes, the relation back doctrine applies equally to § 2254 and § 2255 petitions.

the initial petition); United States v. Pittman, 209 F.3d 3 14 (4th Cir. 2000) (claims do not relate back simply because petitioner is attacking the same trial and sentencing); United States v. Craycraft, 167 F.3d 451 (8th Cir. 1999) (additional theory of ineffective assistance barred); United States v. Duffus, 174 F.3d 333 (3rd Cir. 1999) (same). See also McClain v. Hill, 52 F. Supp.2d 1133, 1144 (C.D.Ca1. 1999).

As previously discussed in the Findings, Anthony v. Cambra is not to the contrary in that the claim sought to be barred in that case had been raised in the initial federal petition which had been erroneously dismissed thus satisfying the notice provisions of Rule 15(c). No such thing happened here.

The court cannot find that an involuntary statement claim whose genesis is based on petitioner's pre-trial interrogation by the police derives from the same core of facts as the third party videotape Confrontation Clause issue. Not even the same constitutional amendment is in dispute for the

underlying events. Obviously, the theories and facts of the claims are distinct.

Petitioner urges that respondent waived the statute of limitations defense before the district judge, not by directly expressing a waiver, but by his actions in requesting a ruling on the merits. Petitioner's waiver theory is not supported by law. That is, a party does not waive a procedural defense in habeas corpus by seeking an alternative ruling on the merits. Cf. Harris v. Reed, 489 U.S. 255, 264 (n.10), 109 S. Ct. 1038, 1044 (1989) (procedural default ruling may be accompanied by an alternative ruling on the merits). Moreover, the unique circumstances present when the alternative ruling was requested, i.e., the ambiguity of the procedural defense occasioned by the then withdrawn Ninth Circuit case, indicate that no waiver was intended when the Deputy Attorney General requested that the court rule on the merits as well. The fact that the district judge would not rule on the merits without a recommendation from the magistrate judge does not

bespeak the deputy's state of mind vis-a-vis waiver. It bespeaks the knowledge that the deputy really had no choice in the matter once the district judge discussed the procedure to be followed.

Equitable tolling cannot be permitted here because, as set forth in the Findings, petitioner's non-represented status (after his state conviction became final, but before federal habeas proceedings), and his general ignorance of the law, cannot justify equitable tolling. Finally, petitioner's belated, involuntary statement claim does not implicate actual innocence.

Conclusion

Accordingly, the undersigned recommends that Claim 1 be dismissed as time barred. No decision on the merits should be made. Claim 2 is re-submitted to the district court with a recommended denial on the same basis as set forth in the initial Findings and Recommendations.

These findings and recommendations are submitted to

the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: May 14, 2002.

/s/
UNITED STATES MAGISTRATE JUDGE

GGH:gh:035
felix828.fr

United States District Court
for the
Eastern District of California
May 14, 2002

** CERTIFICATE OF SERVICE **

Felix

v.

Warden

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on May 14, 2002, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

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SH/WBS

VC/GGH

[Cert. of Service cont'd]

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Jack L. Wagner, Clerk

By: /s/
Deputy Clerk

APPENDIX E

NOT TO BE PUBLISHED

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

FILED
(Sacramento) Feb 25 1997
COURT OF APPEAL THIRD DISTRICT
---- ROBERT L. LISTON, Clerk
By_____ Deputy

THE PEOPLE Plaintiff and Respondent, v. MARIO LAWSON et al. Defendants and Appellants.	C021597 (Super. Ct. No. 93F09225)

In a joint trial, a jury convicted defendants Mario Lawson and Jacoby Felix of first degree murder (Pen. Code, § 187 [all further unspecified statutory references are to this code]) with special circumstances, i.e., murder in the course of a robbery (§ 190.3, subd. (a)(17), as well as second degree robbery (§ 211). The jury further found that each defendant was armed with a firearm during the commission of the offense (§ 12022, subd. (a))..

On appeal from a judgment of life without the possibility of parole, defendants claim the court erred (1) by failing to give former CALJIC No. 311.1, (2) by denying their right to confrontation and cross-examination in admitting the out-of-court statement of a third-party witness, and (3) in instructing the jury pursuant to CALJIC No. 2.90. They also challenge the sufficiency of the evidence that they were "major participants " in the robbery as defined in section 190.2, subdivision (d). We affirm.

BACKGROUND

Around 11 p.m. o the night of September 21, 1993, Lawrence Gallow and his girlfriend Paula were driving in their automobile when his car stalled near the corner of Eighth Avenue and San Jose Way in Sacramento. After ascertaining that the car was out of gas, Gallow went across the street to ask a man who was smoking a cigarette if he could give them a lift to the gas station. The man, later identified as Richard Harper, agreed.

The three of them walked over to Harper's car and Paula was just about to get in, when a man wearing a hood and a red rag over his face approached and ordered them at gunpoint to "give up the car." Gallow told Paula to "run " and fled himself, taking cover behind his own car. From there, he observed two more men, also wearing hoods on their heads and rags over their faces, approach the scene. One man, who appeared to have a handgun, walked toward Harper's car, while the third man, who was holding a big military-style weapon, stood in the middle of the intersection.

Gallow took off running and was closely pursued by the man with the big gun. He jumped over a fence and through some yards and was turning a corner when the pursuer fired at least one shot at him. He ultimately evaded his assailant and found his way home safely.

Harper also fled on foot but was not so lucky. The other robbers gave chase and shot at him several times. He was found dead in a field not far from his car, with a bullet in the

back of his head.

After shooting Harper, the two robbers entered his car and drove away with the headlights turned off. That night, Harper's car was seen puling up in the vicinity of defendant Felix's house at 11th Avenue and Santa Cruz Way, followed five to ten minutes later by Felix's green Caprice. Three or four men got out of the Caprice and stood around talking while the passenger door to Harper's car remained open. Harper's car was discovered by police the next morning at the same location with a broken dashboard and wires hanging down from the steering wheel. A palm print and fingerprint belonging to defendant Lawson were recovered from the back of Harper's car.

A month later Nathan Potts, who had been arrested for armed robbery, negotiated a deal with detectives to provide information and testimony about the Harper murder in exchange for a promise of no prison time. Potts testified that the time of the murder he was a good friend of Lawson's,

who lived upstairs from him, and was also acquainted with Felix. Early one morning, shortly after the murder, Potts was awakened by loud music playing outside on the street. He went outside and saw Felix and Lawson standing around their cars. Felix was working on his car, hooking up "some music [amplifiers, speakers, etc]," with Lawson's assistance.[1/] Lawson asked Potts if he had heard about the killing on Eighth Avenue. When Potts replied affirmatively, Lawson admitted he had been involved. He said he had chased someone with a gun and fired his weapon, but was unsure if he hit anyone. Felix said hat a woman might have seen him and he was "going back to smoke [shoot] her."

Some time later, Felix, who appeared very upset, told Potts that people were trying to implicate him in the murder; that he "already had his story straight;" and that if the police contacted him he would have an alibi.

---

1. Potts testified that the men were hooking up 12-inch speakers to Felix's car. Another witness, Kenneth Williams, told police he was both defendants taking a pair of 12-inch speakers out of Harper's car.

When Felix and Lawson were interviewed by police, each gave false and/or contradictory statements concerning their activities on the night of the murder.

The centerpiece f the prosecution's case was an interview given by Kenneth Williams to Police Detective Toni Winfield, who was investigating Harper's murder. The interview was transcribed and videotaped, and portions of the tape were played during Williams testimony.

Williams, who was in custody at the time on a minor unrelated matter, appeared nervous and upset, crying at the beginning of the interview because "I don't want to snitch on my homies [best friend]." He told Winfield that just before the robbery he overheard Felix, Lawson and a third man, Ellis Curtis,[2] planning to "jack the dude " who lied around the corner for some "weed," meaning to rob Harper to obtain

2. Although the information is not readily available in the record, the Attorney General represents, without contradiction, that Curtis was convicted in a prior joint trial with Lawson and that the trial below was a retrial of Lawson, the first jury having deadlocked over Lawson's guilt.

marijuana.[3] Felix had an automatic weapon and Curtis had a .38 revolver.

Williams saw the three men go the around the corner and about two minutes later he heard six or seven shots ring out. He then observed Curtis and Felix hop into Harper's car and drive off. Williams saw the trio a short time later going through Harper's car. Williams asked Felix whether he shot Harper, and Felix replied, "I think so."

At trial, Williams consistently denied any memory of the interview with Detective Winfield, despite being shown videotape excerpts in front of the jury.

Defense

The defense presented testimony that Nathan Potts was an unreliable and untrustworthy witness. Lawson did not testify. Felix testifying in his own defense, said he was in the vicinity on the night of the murder and heard gunshots, but insisted he did not participate. He claimed he saw two men exit Harper's

3. Harper was known in the neighborhood was a marijuana dealer.

car shortly after the shots were fired, and gave then a ride, in exchange for which they gave him two window speakers from the car.

DISCUSSION

I

Because Williams, at trial, claimed total memory loss with respect to the statements incriminating them in his interview with Detective Winfield, defendants maintain the trial court should have instructed the jury with former CALJIC No. 3.11.1 and the rule in *People v. Gould* (1960) 54 Cal.2d 621, that a witness's out-of-court identification "that cannot be confirmed by an identification [of the defendant] at the trial is insufficient to sustain a conviction in the absence of other evidence to connect the defendant with the crime." (*Id.* at p. 631.)

The argument has no merit. In *People v. Cuevas* (1995) 12 Cal4th 252 the Supreme Court overruled *Gould's* holding that a repudiated extrajudicial identification of the defendant is

insufficient by itself to sustain a conviction Instead, the court held the sufficiency of the out-of-court statement should be determined by applying the substantial evidence standard of *People v. Johnson* (1980) 26 Cal.3d 557, 578. (*Cuevas, supra*, at pp. 257, 271-272, 277.) More importantly, the court expressly disapproved both the holding of *People v. Marquez* (1993) 14 Cal.App.4th 115, 121 that the trial court must instruct the jury sua sponte on the *Gould* corroboration requirement *and* CALJIC No. 3.11.1 (5th ed. 1995 supp.), which embodies the *Marquez* holding. (*Cuevas, supra*, at p. 275, fn. 5.)

While tacitly admitting *Cuevas* defeats their argument, defendant assert it would violate their constitutional rights to apply *Cuevas* retroactively so as to apply to crimes committed, as this one was, before *Cuevas* became final.

The California Supreme Court has rejected this motion in *Cuevas* itself, noting "there is no due process obstacle to retroactive application of our decision." (*Cuevas, supra*, 12

Cal.4th at p. 275.)

Even if we agreed with defendants' assertion that the court erred in failing to give a *Gould* instruction, any error must be considered harmless because Williams's out-of-court statements *were* substantially corroborated by (1) the damaging testimony of Nathan Potts,[4] (2) Lawson's fingerprints on Harper's car, (3) Felix's possession of the victim's car stereo components, and (4) defendants' false statements to the police concerning their comings and goings on the night of the murder.

There was no instructional error.

II

Defendants argue that the court committed error of constitutional magnitude in admitting Williams's statement to Detective Winfield as "prior inconsistent statements " because Williams, in his trial testimony, claimed to have no

4. Potts testified that both defendants admitted their involvement in the crime. That he may have been an unreliable witness was a question for the jury to decide, and defendants' belated attack on his credibility is not properly addressed to this court.

memory of the interview. The gist of the argument is that Williams's failure to recall *any* of the statements effectively denied them the right to cross-examine him, thus bringing the case within the exception of *People v. Green* (1971) 3 Cal.3d 981, 990.

The argument presupposes that Williams's lack of memory was genuine and not feigned, for if it was feigned, the law is well established that the interview statements would be admissible. "Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness'[s] prior statement [citation], and the same principle governs the case of the forgetful witness." (*People v. Green*, *supra*, 3 Cal.3d at p. 988.) *When a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied.* (*Id.* at pp. 988-989.) "As long as there is a reasonable basis in the record for concluding that the witness's 'I don't' remember' statements are evasive and untruthful, admission of his or her prior statements is proper." (*People v. Johnson* (1992) 3

Cal.4th 1183, 1219-1220.)

Defendants did not request that court make a finding that Williams was being truthful in is claimed memory loss, rendering him unavailable as a witness. (Evid. Code, § 240; see *People v. Price* (1991) 1 Cal.4th 324, 413.) Since there was no request for a judicial determination of this preliminary fact, we imply a finding Williams was not unavailable as a witness from the court's admission of his testimony. (Evid. Code, § 402, subd. (c).)

The trial courts comments in response to defendants' motion to strike Williams's testimony show it considered his "memory loss" to be disingenuous.[5] This finding has ample support in the record. Numerous times, when asked if he remembered the statements being shown in the videotape,

---

5. The court made the following pertinent comments. "Hostile witnesses are not unknown in the law. When they appear, they have to be dealt with. [¶] There were transcripts of his prior testimony available to impeach him. There were statements that he had made to the detectives which were available to both the prosecution and the defense to impeach him. [¶] *His failure of recollection was obviously contrived*, which is why the statements that he made on those precious occasions are admissible as evidence, available for consideration by the jury." (Emphasis added.)

Williams, rather than claiming memory loss, said "I don't know." When asked why he was telling the jury that he did not remember anything, Williams replied, "Because I don't feel like being here period." Significantly, one of the few admission Williams did make during his trial testimony was that he was crying during the interview because he did not want to "tell on them [defendants]."

Substantial evidence supports the court's determination that Williams was an evasive and hostile prosecution witness. His statements at the Winfield interview were therefore properly admitted to impeach him. (*Johnson, supra*, 3 Cal.4th at pp. 1219-1220.)

III

Each defendant challenges the jury's findings that he was a "major participant " in the robbery and murder of Harper, within the meaning of section 190.2, subdivision (d). This subdivision provides that a finding of special circumstances applies to "every person, *not the actual killer*, who, with

reckless indifference to human life *and as a major participant*, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony [including robbery]." (Italics added.)

The standard of review is clear. "When the sufficiency of evidence is attacked, the appellate court must view the evidence in the light most favorable to the judgment, presuming the existence of every fact the trier of fact could reasonably deduce from the evidence. Even if the evidence might reasonably be reconciled with the defendant's innocence, the appellate court may not substitute its judgment for the trier's. The test on appeal is whether any rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Bustos* (1994) 23 Cal.App.4th 1747, 1754.)

We disagree with Lawson's threshold premise that a "major participant " must be either a "triggerman " or "ringleader/" Such a proposition is irreconcilable with the

language of the statute permitting special circumstance liability to be imposed upon one who does not personally do the actual killing but nevertheless "aids, abets. counsels, commands, . . . or assists " the underlying crime.

We further find the evidence sufficient to support a finding that each defendant was a major participant within the meaning of section 190.2, subdivision (d). Lawson and Felix were both present with Curtis when the three of them discussed and planned the robbery of Harper, a discussion during which Felix and Curtis had guns at hand. All three assailants wore clothing designed to cover their faces and conceal their identities. There was evidence from which the jury could conclude Felix was indeed the triggerman who pursued and shot Harper, then left him to die as he drove off with Curtis in the victim's car, while Lawson chased Gallow through several backyards and shot at him in an apparent effort to eliminate the principal eyewitness to the crime.

We have no trouble upholding the jury finding that both

defendants were "major participants" who, with reckless indifference for human life, aided, abetted, and assisted in the robbery of Harper. (Compare *People v. Bustos*, *supra*, 23 Cal.App.4th at pp. 1754-1755; *People v. Mora* (1995) 39 Cal.App.4th 607, 618-619.)

IV

Defendant launches a constitutional attack on the reasonable doubt instruction given to the jury, revised CALJIC No. 2.90, on the ground that it impermissibly lightened the prosecution's burden of proof. This argument has been raised and rejected in numerous recent appellate decisions (e.g., *People v. Barillas* (1996) 49 Cal.App.4th 1012, 1022; *People v. Tran* (1996) 47 Cal.App.4th 253, 262-263; *People v. Carroll* (1996) 47 Cal.App.4th 892, 895-896; *People v. Light* (1996) 43 Cal.App.4th 1073, 1077-1079), and thus bears no further discussion.

DISPOSITION

The judgment is affirmed.

CALLAHAN, J.

We concur:

PUGLIA, P.J.

SPARKS, J.

APPENDIX F

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	
Plaintiff and Respondent,	C021597
MARIO LAWSON et al.,	Sacramento No. 93F09225
Defendants and Appellants.	

PETITION FOR REVIEW
(FELIX)

Mark D. Greenberg
Attorney at Law
State Bar No. 99726
484 Lake Park Avenue, No. 429
Oakland, CA 94610
(510) 452-3126

Attorney for Appellant

Third Appellate District No. C021597
S060031

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Respondent

v.

MARIO LAWSON et al., Appellants

Appellants' petition for review DENIED.

SUPREME COURT
FILED
MAY 14 1997
ROBERT WANDRUFF, CLERK
/s/
DEPUTY

/s/
Chief Justice

APPENDIX G

Jacoby Lee Felix J-72455
In Pro Per
D-3 112
California State Prison - Salinas Valley
P.O. Box 1060
Soledad, CA 93960-1060

Attorney for: Jacoby Felix, In Pro Per

FILED
May - 8 1998
Clerk, U.S. District Court
Eastern District of California
By_____
DEPUTY CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JACOBY LEE FELIX,	)	
	)	
PETITIONER	)	Case No.
	)	CIV S-98-0828 WBS GGH P
vs .	)	
	)	
WARDEN, California State Prison	)	PETITION FOR WRIT OF
	)	HABEAS CORPUS
at SALINAS VALLEY DOES 1-10,	)	
	)	
RESPONDENTS		

PETITION FOR WRIT OF HABEAS CORPUS

on DIRECT APPEAL FROM A

CALIFORNIA SUPREME COURT DECISION

This petition concern a conviction. My name **is Jacoby Lee Felix**, California Department of Corrections, **Number J 72455**. I was tried with co-defendant Mario Lawson.

JURISDICTION

I was convicted of the following offenses and enhancements with: First Degree Murder (Penal Code 187); Robbery (211 Penal Code) and special circumstance allegation (190.2 (a) Penal Code, supd. (a) (17) connected to the murder charge and Use of Firearm in commission of a crime (Penal Code 12022 (a)).

Sentencing Court: **Sacramento County Superior Court,** Los Angeles,

Honorable Jack Spaunor.

Case Number: SC No. 93F09225

DATE OF VERDICT: July 6, 1995 Verdict: Guilty of First Degree Murder with all special circumstances

SENTENCED: AUGUST 25, 1995 TERM: Life without possibility of Parole. Notice of Appeal was timely filed.

Yes, I am PRESENTLY in custody at the Calipatria State Prison, Salinas Valley, Soledad, California 93960-1060.

NO PRIOR POST CONVICTION RELIEF HAS BEEN

SOUGHT OTHER THAN THIS DIRECT APPEAL FROM THE DECISION OF THE CALIFORNIA SUPREME COURT.

APPEAL ACTIVITIES

YES, I did take an appeal from my conviction to the following courts :

Court of Appeal of the State of California, Third Appellate District.

JUDGMENT AFFIRMED February 25, 1997.

Supreme Court of the State of California April 1, 1997 Petition for Review **Denied May 13, 1997**

The Grounds and issues presented in this Federal Habeas Corpus are the same as those presented to the state courts thus exhausting state remedies on ALL issues as required by law.

The only opinion rendered in the appeal process thus far was the UNPUBLISHED DECISION OF THE COURT OF APPEAL (supra) Refer to Appendix B for text of that opinion.

OTHER POST-CONVICTION REVIEWS

THIS PETITIONER has NOT filed any other post-conviction reviews other than those mentioned previously in this Petition which is a continuation of the DIRECT APPEAL process after exhausting all state remedies. Since the Petitioner **is still within the ONE YEAR statutory period to proceed with his DIRECT APPEAL,** it is not appropriate for Petitioner to initiate any new post-conviction proceedings until all level have been exhausted on the DIRECT APPEAL ISSUES.

There are NO other post-conviction reviews pending in ANY court at this time.

TRIAL INFORMATION

The Petitioner did have the following state court proceedings: Arraignment; Preliminary Hearing. There were no motions to suppress filed. **There was a motion for a new trial that was denied. There was also a motion for bifurcation of the trials of the co-defendants which was**

also denied. Petitioner did not enter a guilty plea in this case. The Petitioner had Jury Trial. **The Petitioner did testify in his trial.**

GROUNDS FOR RELIEF FROM CONVICTION

For the purpose of this Petition is advancing the same issues as presented in state court to exhaust his review remedies on those issues. The petitioner respectfully direct the court to **Appendix A** for the Issues on Review, **Submitted to the California Supreme Court Supporting Facts (Arguments), Points and Authorities** as presented:

However, in summary the grounds are:

GROUND ONE: Failure to instruct the Jurors on corroboration of repudiated extrajudicial statement, which has been overruled, was error, and to deny petitioner relief based on the judicial abrogation of the rule constitute a violation of due process.

GROUND TWO: Even though Williams' extrajudicial statement was admitted as a prior inconsistent statement, this evidence nonetheless violated the Sixth Amendment right to confront hostile witness.

GROUND THREE: Evidence was insufficient to establish that appellant was a "major participant."

ALL OF THE ABOVE GROUNDS WERE PRESENTED IN THE STATE COURT.

Supporting Cases and Authorities: Please refer to Appendix A and B.

ATTORNEY INFORMATION

Trial attorney, arraignment and preliminary hearing, Sentencing: Mark Millard, Esq., Alternative Defense Counsel, Sacramento, California.

Appeal Attorney: Mark D. Greenberg, Esq., 484 Lake Park Avenue, No. 129, Oakland, California, 94610.

The Petitioner's attorney was appointed by the State. The petitioner is not alleging that his attorney was ineffective in this petition.

The petitioner is In Propria Persona in this Petition.

The Petitioner prays that the court **appoint an attorney to represent him before this court** should find merit with his issues and subsequent appearances or filings become necessary before this court.

Furthermore, the petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

Executed at Calipatria State Prison, California.

Dated: 5-4-98

/s/
Jacoby Lee Felix J-72455

FORMA PAUPERIS AFFIDAVIT

I Hereby apply for leave to proceed with this Habeas corpus petition without prepayment of fees or costs or security therefor. In Support of my application, I state that the following facts are true:

(1) I am the petitioner in said petition, and I believe I am entitled to redress.

(2) I am unable to pay the costs of said action or give security because: I am an indigent inmate in a California State Prison without a source of income.

/s/
Jacoby Lee Felix J-72455

STATE OF CALIFORNIA)

COUNTY OF MONTEREY)

I declare under penalty of perjury that the foregoing is true and correct.

[Affidavit cont'd]

Signed on 4 May 1998.

/s/
JACOBY LEE FELIX J-72455

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA COUNTY OF SACRAMENTO:

I am a resident of the City of Sacramento, in Sacramento County, and I affirm that on 5/8/98 I served the within Writ of Habeas Corpus on the below listed parties by placing a true copy in a sealed envelope with postage thereon fully prepaid in the United States mail at Sacramento, California, addressed as follows:

UNITED STATES DISTRICT COURT, Eastern District,

650 Capitol Mall, Sacramento, CA 95814

Clerk, California State Supreme Court

303 Second Street, 8th Floor, San Francisco, CA 94107

[Proof of Service by Mail cont'd]

Warden, California State Prison at Salinas Valley

P.O. Box 1060, Soledad, CA 93960-1060

Daniel Lungren, Attorney General, State of California

P.O. Box 903447, Sacramento, CA 94203

Clerk of the Sacramento County for delivery to: Hon. Jack V. Sapunor, Judge Department 6, 720 9th Street, Room 102

Sacramento, CA 95814

District Attorney, Sacramento County, 901 G Street,

Sacramento CA 95814

CALIFORNIA APPELLATE PROJECT, 2407 J Street,

#301, Sacramento, CA 95816

PROOF OF SERVICE CONTINUED

I declare that under penalty of perjury under the laws State of California that the foregoing is true and correct.

Executed on 5/8/98 at Sacramento, California.

/s/
Cynthia McDowell
7355 Willowwick Way
Sacramento, CA 95822

APPENDIX H

APPEAL 9THCIR

DISTRICT OF CALIFORNIA
EASTERN DISTRICT OF CALIFORNIA (Sacramento)

CIVIL DOCKET FOR CASE #: 98-CV-828

Felix v. Warden, et al — Filed: 05/08/98
Assigned to: Judge Morrison C England, Jr
Referred to: Magistrate Judge Gregory G Hollows
Demand: $0,000 — Nature of Suit: 530
Lead Docket: None — Jurisdiction: Federal Question
Dkt# in other court: None
Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

JACOBY LEE FELIX
petitioner

Ann Catherine McClintock
[term 09/17/98]
1 916 498 6656
[COR LD NTC pda]
Federal Defender
801 K Street
Suite 1024
Sacramento, CA 95814
916-498-5700

David M Porter
1 916 498 6656
[COR LD NTC]
Federal Defender
801 K Street
Suite 1024
Sacramento, CA 95814
916-498-5700

v.

CA STATE PRISON, Warden at Salinas Valley
respondent
[term 02-02-99]

Mathew Chan
[term 02-01-99]
[COR LD NTC]
Attorney General's Office
PO Box 944255
1300 I Street
Suite 125
Sacramento, CA 94244-2550
916-445-9555

ATTORNEY GENERAL FOR THE STATE OF CALIFORNIA
respondent

Mathew Chan
(See above)
[COR LD NTC]

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APPEAL
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DENISE MAYLE, Warden
respondent

Mathew Chan
(See above)
[COR LD NTC]

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APPEAL
Proceedings include all events. 9THCIR
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5/8/98	1	PETITION FOR WRIT OF HABEAS CORPUS fee status paid receipt #185253, assigned to Chief Judge William B. Shubb referred to Magistrate Gregory G Hollows (ljr) [Entry date 05/11/98] [Edit date 05/11/98]
5/29/98	2	ORDER by Magistrate Judge Gregory G Hollows ORDERING the Federal Defender appointed as counsel, counsel to contact clerks office to make arrangements to copy file; pretrial conference set for 10:00 6/25/98; parties to file status reports 14 days before the pretrial conference, failure to file timely may result in sanctions; the Clerk to serve Robert Anderson with copy of application and this order (cc: all counsel) (rp) [Entry date 05/29/98]

6/8/98	3	NOTICE by respondent CA State Prison of related case(s) CIV S-98-667 DFL JFM P (gm) [Entry date 06/11/98]
6/9/98	--	RESERVICE of DOCUMENT(S) Order [2-11, [2-21 addressed to the federal defender on behalf of petitioner Jacoby Lee Felix (cc: all counsel) (gk) [Entry date 06/09/98]
6/10/98	4	STATUS REPORT by petitioner Jacoby Lee Felix (cld) [Entry date 06/11/98]
6/10/98	5	STATUS REPORT by respondents CA State Prison and Attorney General CA (cld) [Entry date 06/11/98]
6/26/98	6	MINUTES of Proceedings before Magistrate Judge Gregory G Hollows pretrial conference held on 6/26/98; after a lenghy discussion the court stated it will issue an order deciding what to do because, there has been a notice of related cases filed (gk) [Entry date 06/26/98]
9/15/98	7	ORDER by Magistrate Judge Gregory G Hollows ORDERING petitioner to file an amended complaint within 30 days; respondent to file an answer or motion to dismiss 30 days thereafter, with petitioner's traverse due 30 days from that date; petitioner to follow Local Rules in filing an opposition to any motion to dismiss (cc: all counsel) (rp) [Entry date 09/15/98]
9/17/98	8	LETTER to court from counsel for petitioner Jacoby Lee Felix stating case has been reassigned to FD David Porter (kh) [Entry date

09/21/98]

10/15/98 -- LODGED request for extension of time for filing of amended petition and proposed order thereon by petitioner Jacoby Lee Felix (rp) [Entry date 10/16/98]

10/22/98 10 LETTER to court from counsel for respondents re participation in petitioner's request for extension of time (rp) [Entry date 10/23/98]

APPEAL

Proceedings include all events. 9THCIR
2:98cv828 Felix v. Warden, et al

10/23/98 9 ORDER by Magistrate Judge Gregory G Hollows ORDERING lodged request for extension of time GRANTED; petitioner's amended petition for a writ of habeas relief to be filed by 11.30.98 (cc: all counsel) (rp) [Entry date 10/23/98]

11/6/98 11 LETTER to court from counsel for petitioner regarding M Chan's letter to the Court dated 1/22/98 [10-1] (rb) [Entry date 11/09/98]

11/30/98 -- LODGED request for extension of time for filing of amended petition or supplemental memorandum of points and authorities by petitioner Jacoby Lee Felix (rp) [Entry date 12/01/98]

12/10/98 12 ORDER by Magistrate Judge Gregory G Hollows ORDERING request for an extension of time for filing of amended petition or supplemental memorandum of points and authorites is GRANTED; petition due 1/14/99 (cc: all counsel) (rb) [Entry date 12/10/98]

1/14/99 -- LODGED request for extension of time for filing of amended petition; order by counsel for petitioner Jacoby Lee Felix (rb) [Entry date 01/19/99]

1/28/99 13 ORDER by Magistrate Judge Gregory G Hollows ORDERING lodged request GRANTED; petitioner's amended petition to be filed by 1.28.99 (cc: all counsel) (rp) [Entry date 01/28/99]

1/28/99 14 AMENDED petition for writ of habeas corpus by petitioner Jacoby Lee Felix [1-11 (dd) [Entry date 01/29/99]

2/1/99 15 AMENDED [1-1] PETITION FOR WRIT OF HABEAS CORPUS terminates respondent CA State Prison adding respondent Denise Mayle (chl) [Entry date 02/02/99]

2/25/99 16 NOTICE by respondent of motion to dismiss petition for writ of habeas corpus (rb) [Entry date 02/26/99]

2/25/99 17 MOTION to dismiss case by respondents CA State Prison, Attorney General CA, and Denise Mayle Motion Hearing Set for 10:00 4/29/99 (rb) [Entry date 02/26/99]

2/25/99 18 NOTICE by respondent of motion to dismiss party Attorney General (rb) [Entry date 02/26/99]

2/25/99 19 MOTION to dismiss party by respondent Motion Hearing Set for 10:00 4/29/99 (rb) [Entry date 02/26/99]

4/12/99 -- LODGED unopposed request by petitioner Jacoby Lee Felix to continue hearing date currently set for 4/29/99 (rp) [Entry date 04/13/99]

4/22/99 -- LODGED unopposed request to continue hearing date currently set for 5/6/99; proposed order by counsel for petitioner Jacoby Lee Felix (ac) [Entry date 04/23/99]

4/23/99 20 ORDER by Magistrate Judge Gregory G Hollows ORDERING lodged unopposed request GRANTED, motion to dismiss party by respondent [19-1] HEARING RESET FOR 10:00 5/6/99, motion to dismiss case by respondents CA State Prison, Attorney General CA, and Denise Mayle [17-1] HEARING RESET FOR 10:00 5/6/99 (cc: all counsel) (rp) [Entry date 04/23/99]

4/27/99 21 ORDER by Magistrate Judge Gregory G

Hollows ORDERING lodged request GRANTED motion to dismiss party by respondent [19-1] HEARING RESET FOR 10:00 5/20/99, motion to dismiss case by respondents CA State Prison, Attorney General CA, and Denise Mayle [17-1] HEARING RESET FOR 10:00 5/20/99 (cc: all counsel) (rp) [Entry date 04/27/99]

5/6/99 22 OPPOSITION by petitioner Jacoby Lee Felix to motions to dismiss [19-1], [17-1] (rp) [Entry date 05/07/99]

5/14/99 -- LODGED unopposed request to continue hearing date currently set for 5/20/99; lodged order by petitioner Jacoby Lee Felix (ac) [Entry date 05/17/99]

5/18/99 23 ORDER by Magistrate Judge Gregory G Hollows ORDERING lodged request GRANTED; motion to dismiss party by respondent [19-1] HEARING RESET FOR 10:00 6/17/99; motion to dismiss case by respondents CA State Prison, Attorney General CA, and Denise Mayle [17-1] HEARING RESET FOR 10:00 6/17/99 (cc: all counsel) (rp) [Entry date 05/18/99]

6/15/99 24 REQUEST by respondent to vacate hearing on motion to dismiss (chl) [Entry date 06/16/99] [Edit date 06/16/99]

6/24/99 25 ORDER by Magistrate Judge Gregory G Hollows ORDERING request to vacate the motion to dismiss hearing [24-1] GRANTED; motion to dismiss party by respondent

Attorney General [19-1] GRANTED; respondents request for extension of time to 9/15/99 to file an answer GRANTED (cc: all counsel) (rp) [Entry date 06/24/99]

9/14/99 -- LODGED request for extension of time to file answer by respondent Denise Mayle (rp) [Entry date 09/15/99]

9/23/99 26 ORDER by Magistrate Judge Gregory G Hollows ORDERING extension of time until 10/15/99 to answer for Denise Mayle; GRANTED; no further extensions (cc: all counsel) (rb) [Entry date 09/23/99]

9/29/99 27 ANSWER by respondent; memorandum of points and authorities in support thereof (rb) [Entry date 09/29/99]

APPEAL

Proceedings include all events. 9THCIR
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9/29/99 28 NOTICE of lodging by respondent of Reporters' transcript on Appeal Volume I, pp 1-297; Vol 11, pp 298-579; Vol 111, pp 580-863; Vol IV, pp 864-1147; Vol V, 1148-1431; Vol VI, pp1432-1569; Clerk's Augmented Transcript on Appeal, Vol I, pp 1-300; Clerk's Transcript on Appeal, pp 581-595 and 700-727 (rb) [Entry date 09/29/99]

11/1/99 -- LODGED Request for additional time to file

traverse by petitioner Jacoby Lee Felix (pp) [Entry date 11/03/99]

11/4/99 29 ORDER by Magistrate Judge Gregory G Hollows ORDERING petitioner's request for additional time until 1/22/00to file traverse GRANTED (cc: all counsel) (rb) [Entry date 11/04/99]

1/21/00 30 TRAVERSE by petitioner (pp) [Entry date 01/24/00]

2/9/01 31 FINDINGS AND RECOMMENDATIONS by Magistrate Judge Gregory G Hollows RECOMMENDING that petitioner's application for writ of habeas corpus be denied; the F&Rs are submitted to the District Judge; objections are due within 20 days; (cc: all counsel) (khl) [Entry date 02/09/01]

2/22/01 -- LODGED Unopposed request to extend time to file objs to F&R; Declaration of counsel; Order thereon by petitioner Jacoby - - - Lee Felix (ea) [Entry date 02/23/01]

3/6/01 32 ORDER by Magistrate Judge Gregory G Hollows ORDERING lodged request for extension of time to file objections to F&Rs is GRANTED; on or before 4/4/01; any reply 10 days thereafter; (cc: all counsel) (khl) [Entry date 03/06/01]

4/4/01 33 OBJECTIONS TO FINDINGS AND RECOMMENDATIONS [31-1] by petitioner Jacoby Lee Felix (ea) [Entry date 04/05/01]

4/16/01	--	LODGED Unopposed Request to extend time to file objections to Findings and Recommendations; Declaration of counsel by respondents (ndd) [Entry date 04/17/01]
4/24/01	34	ORDER by Magistrate Judge Gregory G Hollows ORDERING that respondent is granted extension of time until 5/4/01 to file reply to objections to findings & recommendation order [31-1] (cc: all counsel) (as) [Entry date 04/24/01]
5/1/01	35	REPLY by respondent Denise Mayle to objections to Findings and Recommendations [33-1] (ea) [Entry date 05/02/01]
6/5/01	26	MINUTE ORDER by Courtroom Deputy S. Hoover informing parties that oral argument has been SET in the above-entitled matter for 9:00 06/13/01, before the Honorable William B. Shubb; in-court hearing set for 9:00 6/13/01 (cc: all counsel) (ar) [Entry date 06/06/01]

APPEAL

Proceedings include all events. 9THCIR
2:98cv828 Felix v. Warden, et al

6/13/01	37	MINUTES before Chief Judge William B. Shubb oral argument on petition for writ of habeas corpus hearing held on 6/13/01; Matter referred back to Magistrate Judge; Court to prepare order; C/R Kelly O'Halloran (pb) [Entry date 06/14/01]

6/15/01	38	ORDER by Chief Judge William B. Shubb ORDERING this matter is referred back to the magistrate judge for findings and recommendations on the merits (cc: all counsel) (ds) [Entry date 06/15/01]
7/18/01	39	TRANSCRIPT of 6/13/01 hearing on Section 2254 motion by C/R Kelly O'Halloran (pb) [Entry date 07/19/01]
8/16/01	40	ORDER by Gregory G Hollows Magistrate Judge ORDERING that the parties shall file a response within ten days indicating whether a hearing on the merits is still necessary in light of the most recent Duncan opinion (cc: all counsel) (ak) [Entry date 08/16/01]
8/22/01	41	RESPONSE by respondent to order [40-1] (bd) [Entry date 08/22/01]
8/24/01	--	LODGED order and unopposed request to extend time to file response to court order filed on 08/16/01 by petitioner Jacoby Lee Felix (pw) [Entry date 08/27/01]
8/30/01	42	ORDER by Magistrate Judge Gregory G Hollows ORDERING that the time for petitioner to file his response addressing the Duncan decision shall be extended until 9/6/01 (cc: all counsel) (ljr) [Entry date 08/30/01]
9/5/01	43	RESPONSE by petitioner Jacoby Lee Felix to orders [40-1] and [42-1] (bd) [Entry date 09/06/01]
9/5/01	--	LODGED order re waiving of statute of

limitation defense and issuance of F&Rs as to claim one by petitioner Jacoby Lee Felix (bd) [Entry date 09/06/01]

10/2/01 44 ORDER by Gregory G Hollows Magistrate Judge: ORDERING that the court will take all matters under submission without hearing (cc: all counsel) (ak) [Entry date 10/02/01]

5/14/02 45 FINDINGS AND RECOMMENDATIONS by Gregory G Hollows Magistrate Judge RECOMMENDING that Claim 1 be dismissed as time barred; no decision on the merits should be made; Claim 2 is re-submitted to the district court with a recommended denial on the same basis as set forth in the initial F & R (cc: all counsel) (hk) [Entry date 05/14/02]

6/3/02 46 OBJECTIONS TO FINDINGS AND RECOMMENDATIONS [45 - 1] by petitioner (ak) [Entry date 06/04/02]

6/13/02 47 RESPONSE by respondent to pltfs objections to F&Rs [46-1]

(nac) [Entry date 06/14/02]

7/1/02 48 ORDER by Chief Judge William B. Shubb

ORDERING findings & recommendation order [45-1] ADOPTED in full; Claim 1 is dismissed as time barred; Claim 2 is denied on the same basis as set forth in the initial Findings and Recommendations [1-1] (cc: all counsel) (mdp) [Entry date 07/01/02]

7/29/02 49 NOTICE OF APPEAL by petitioner Jacoby Lee Felix from District Court decision re order [48-1] (fee status NOT PAID) (bd) [Entry date 07/30/02]

8/10/02 50 ORDER by Chief Judge William B. Shubb ORDERING Case REASSIGNED to Judge Morrison C. England Jr NO DDLs VACATED (cc: all counsel) (kb) [Entry date 08/10/02]

8/14/02 51 ORDER by Chief Judge William B Shubb ORDERING re appeal [49-1]; A Certificate of appealability should not issue in this action (cc: all counsel) (lm) [Entry date 08/14/02]

8/14/02 -- LODGED request for reconsideration; application for certificate of appealability and for entry of judgment; exhibit; proposed order; by petitioner (nac) [Entry date 08/15/02]

8/16/02 52 MAILED case information/docket fee payment notice, copy of Notice of Appeal to 9th Circuit Court of Appeals, copy of appeal and docket sheet to all parties (bd) [Entry date 08/16/02]

8/16/02 -- CLERK'S record on appeal transmitted to 9th Circuit: case file 2 volumes, 3 expandos and copy of docket mailed to 9th Circuit regarding appeal [49-1] (bd) [Entry date 08/16/02]

APPENDIX I

QUIN DENVIR, Bar #49374
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Attorneys for Petitioner
JACOBY LEE FELIX

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JACOBY LEE FELIX, Petitioner, v. DENEICE A. MAYLE, Warden, Respondent, BILL LOCKYER, Attorney General, Additional Respondent.	NO. CIV S 98-828 WBS GGH P AMENDED PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254

Petitioner JACOBY LEE FELIX, No. J-72455, is currently confined by the Respondent at the Salinas Valley State Prison, Soledad, California, 93960-1020, in violation of the Constitution of the United States.

1. **Name and location of court which entered the judgment of conviction under attack:** Sacramento County Superior Court, Case No. 93F09225

2. **Date of judgment of conviction:** July 6, 1995

3. **Length of sentence:** Life without possibility of parole

4. **Nature of offense involved (all counts):** One count under California Penal Code § 187(a) (first degree murder with special circumstances) and § 12022.5 (enhancement for use of a weapon); one count under California Penal Code § 211 (second degree robbery) and § 12022.5
5. **What was your plea?** Not guilty on all counts

6. **Kind of trial:** Jury

7. **Did you testify at the trial?** Yes

8. **Did you appeal from the judgment of conviction?** Yes

9. **If you did appeal, answer the following:**
(a) Name of court: California Court of Appeal, Third District
(b) Result: Judgment affirmed
(c) Date of Result and citation, if known: February 25, 1997 (C021597, unpublished)
(d) Grounds raised: (1) People v. Cuevas cannot be applied retroactively to eliminate the court's sua sponte duty to instruct that even if Williams were not an accomplice, his extrajudicial statement required corroboration; (2) admitting the extrajudicial statements of Kenneth Williams violated Appellant's federal and state constitutional rights to confront and cross-examine witnesses; (3) the evidence was insufficient as a matter of law to establish Appellant as a "major participant"; and (4) deletion of the phrase "moral certainty" from CALJIC No. 2.90 renders that instruction unconstitutional.

(e) If you sought review of the decision on appeal by a higher state court, please answer the following:
(1) Name of Court: Supreme Court of California
(2) Result: Petition for review denied
(3) Date of result and citation, if known: May 14, 1997
(4) Grounds raised: (1) Failure to instruct the jurors on corroboration of repudiated extrajudicial statements, which has been overruled, was error, and to deny Appellant relief based on the judicial abrogation of the rule constitutes a violation of due process; (2) even though Williams1 extrajudicial statement was admitted as a prior inconsistent statement, this evidence nonetheless violated the Sixth Amendment right to confront hostile witnesses; and (3) evidence was insufficient to establish that Appellant was a "major participant."

10. **Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?** Yes

11. **If your answer to 10 was "yes," give the following information:**
(a) (1) Name of Court: United States District Court
(2) Nature of Proceeding: Petition for Writ of Habeas Corpus
(3) Grounds raised: Same as those presented to Supreme Court of California in petition for review
(4) Did you receive an evidentiary hearing? N/A
(5) Result: Court appointed Federal Defender Office
(6) Date of result: May 29, 1998
12. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary, you may

attach pages stating additional grounds and facts supporting same.

A. Ground One: The state trial court violated petitioner's right to due process and against self-incrimination under the Fifth and Fourteenth Amendments by admitting into evidence petitioner's involuntary statements to police; Petitioner's right to effective assistance of counsel under the Sixth and Fourteenth Amendments was violated by his appellate counsel's failure to raise this claim on direct appeal

The Fourteenth Amendment to the Constitution provides, pertinent part, that "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 2. The Fifth Amendment provides, in pertinent part, "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend V.[1] In the landmark case of Jackson v. Denno, the Supreme Court held that these due process guarantees are violated whenever the state relies on an involuntary

1. The Fifth Amendment's privilege against self-incrimination is held applicable to the states through the Fourteenth Amendment. Malloy v. Hogan, 378 U.S. 1, 11 (1964), overruling Twining v. New Jersey, 211 U.S. 78 (1908)).

confession.[2] "[A] defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession." Jackson v. Denno, 378 U.S. 368, 376 (1964). Over one hundred years ago, the Supreme Court set forth the rule of law to be applied to claims of involuntary confessions: a confession "'must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.'" Malloy, 378 U.S. at 7 (quoting Bram v. United States, 168 U.S. 532, 542-43 (1897)). Conversely, in order to be voluntary, a confession must be "the product of a rational intellect and a free will." Blackburn v. Alabama, 361 U.S. 199, 208 (1960). When a federal habeas court reviews a claim of involuntary confession, it does so de novo. Miller v. Fenton, 474 U.S.

2. Whether the coerced statement is in fact true, indeed whether the coercion used to obtain the statement was not calculated to procure an untrue statement, is irrelevant. Convictions based on coerced confessions must be overturned "not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system." Rogers v. Richmond, 365 U.S. 534, 540-41 (1961).

104, 112 (1985). The federal court is not bound by a state court's finding of voluntariness and has a "duty to make an independent evaluation of the record." Mincey v. Arizona, 437 U.S. 385, 398 (9178). As the Ninth Circuit sitting en banc explained:

> [W]e are not bound by state court findings that the conduct of the interrogating officers was not coercive. . . . [W]e are obligated to conduct an independent review of the constitutional acceptability of the . . . interrogation. . . . We take a fresh look at whether the police used objectively unacceptable methods to coerce [the defendant] into waiving his right to silence. In this regard, "the admissibility of a confession turns as much on whether the techniques for extracting the statements, as applied to *this* suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne."

Collazo v. Estelle, 940 F.2d 411, 415 (1991) (quoting Miller, 474 U.S. at 116, emphasis in Miller, other internal quotes and citations omitted), cert denied, 502 U.S. 1031 (1992).[3]

3: State court findings as to historical or subsidiary facts are, of course, generally entitled to the statutory presumption of correctness, see 28 U.S.C. 5 2254(d); however, this principle does not come into play in this case because the interrogation of Jacoby was recorded by both audio- and videotape. Accordingly, there are no disputes as to the underlying facts.

In determining whether a confession is involuntary, the court applies a "totality of circumstances" test. Haynes v. Washington, 373 U.S. 503, 513-14 (1963).[4] Some of the relevant factors that the Court has identified over the years in applying this test are the the youth of the accused, his lack of education, the lack of any advice to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep. Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1972). The Court has cautioned, however, that the presence or absence of any factor is not controlling, and that courts should engage in "a careful scrutiny of all the surrounding circumstances." Id.

When the totality of circumstances surrounding the

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4. But see White, Police Trickery in Inducing Confessions, 127 U. Pa. L.Rev. 581 (1979), in which the author argues that all promises of tangible benefits made by police during interrogation in order to elicit a confession should be proscribed under a per se rule. According to Professor White, "the difficulty of assessing the effect on the suspect subjected to the interrogation suggests that with respect to this issue the totality of the circumstances test does not provide effective protection for the suspect's constitutional rights." Id. at 623.

interrogation of Jacoby Lee Felix is examined, it becomes clear that (1) the police resorted to inherently coercive tactics to force Jacoby to confess, and (2) the tactics had their intended effect: they overbore Jacoby's will and substantially impaired his free choice. Turning first to the police tactics, the distinguishing characteristic of Jacoby's interrogation was its repeated and prolonged nature. Jacoby was asked to come to the police station "to clear [his] name," and he was told to wait in the lobby when he arrived at the station.[5] CAT 64. Rather than questioning him "as a witness," however, Officer Gardner told him that he was "under arrest for a murder," CAT 62, and he was brought "to a holding room for us as a suspect in this case." CAT 64. The interrogation began at approximately 12:45 a.m., CAT 60, and he was advised of his Miranda rights.[6] CAT 63-64. From the very outset, Gardner

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5. He had to wait a "long" time in the lobby. CAT 3 6 . "CAT " refers to the Clerk's Augmented Transcript on Appeal. "CT" refers to the Clerk's Transcript on Appeal. "RT" refers to the Reporter's Transcript on Appeal.

6. See Miranda v. Arizona, 384 U.S. 436 (1966).

repeatedly hammered on the theme that permeated the interrogation, clearly implying that if Jacoby told the truth, he'd be given leniency: "[Y]ou've got to help yourself out. You've got to tell me what happened." CAT 66.[7] Evidence acquired through such promises of leniency is not the product of free choice; it is, rather, an involuntary statement that is not admissible against the declarant for any purpose. Shotwell Mfg. Co. v. United States, 371 U.S. 341, 347-48 (1963) ("[e]vidence . . . procured [by any direct or implied promises, however, slight] can no more be regarded as the product of a free act of the accused than that obtained by

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7. See also CAT 69 ("this is for you to think about how you want to try and help yourself out"), 74 ("Do you want to help yourself?), 75 ("Help yourself out and tell me the truth the first time"), 105 ("We want you to help yourself out"), 108 ("I need you to help yourself here), 117 ("Don't you want to help yourself out? . . . I'm giving you a chance to help yourself out"), 128 ("you got to think of yourself"), 117 ("You have to help yourself out"), 130 ("You're not willing to help yourself out"), 134 ("Get the heat off your shoulders"), 137 ("Take that first step to help yourself. Don' t sink yourself right now"); 144 (in response to Jacoby's question about his chances of "goin' home from this" "A lot of it depends on what you have to say. A lot of it depends on . . ., how straight up you are with me. Note that the exhortation on page 134 is strikingly similar to the interrogation found to have produced the involuntary statement in Bram: "If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders." Bram, 168 U.S. at 539.

official physical or psychological coercion")). The cumulative effect of these promises and the other coercive interrogation tactics, discussed below, rendered Jacoby's statements involuntary.[8]

Despite Jacoby's adamant and repeated denial of involvement, CAT 65, 68, 96, 119, Gardner kept pressuring him to confess, telling Jacoby that, "You're not being honest with me. You know it and I know it," and "You were there. You know what happened because you saw what happened." CAT 105. Using some of the same psychological ploys and stratagems condemned by the Court in Miranda,[9] Gardner "display[ed] an air of confidence in . . . [Jacoby's] guilt and from outward appearance . . . maintain[ed] only an interest in

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8. See United States v. Powe, 591 F.2d 833, 845 (D.C. Cir. 1978) (reversing conviction and remanding for hearing on the voluntariness of defendant's statements, which were possibly caused by detective's inquiry as to whether defendant wanted to "cooperate and assist herself in this case and help herself out"); Grades v. Boles, 398 F.2d 409, 412 (4th Cir. 1968) (defendant's statement held involuntary as having been induced by what defendant perceived to be a promise of immunity from prosecution).

9. "'[C]oercion can be mental as well as physical, and . . . the blood of the accused is not the only hallmark of an unconstitutional inquisition.'" Miranda, 384 U.S. at 448 (quoting Blackburn, 361 U.S. at 206)).

confirming certain details." Miranda, 384 U.S. at 450. At the beginning of the interrogation, Gardner falsely tells Jacoby, "We know what happened. I can paint you the whole picture as to what happened. But I need to hear it from you. Understand? I know what went down." CAT 66. He falsely states that "Your partners and the witnesses out in the scene there are identifying you. . . . As . . . --- doing the shooting. As doing the shooting. And I swear to that." CAT 122. Gardner intimidated Jacoby by portraying the police and their tactics as omnipotent, as having locked up the case against him and being able to see his guilt-inspired fear. "I've been around [this department] about fifteen years. All right? I've been workin' homicides for awhile. The combined experience of my partners in there, the two other detectives and myself, we got, what, close to forty, fifty years. . . . [Y]ou got to stop and think about it." CAT 55. "I know you. It's all over your face. You're scared, and I don't blame you. If I was in the shoes that you were in, I'd be scared, too."

CAT 56. "[W]e've interviewed hundreds of people, thousands of people, probably, since the time I've come on. . . . I know you should take that step [of confessing] because it's all over your face. It's written right there. It says, 'I want to talk to you. I want to talk. I want to tell you what happened'." CAT 136-37. When Jacoby's account of the night in question failed to satisfy Gardner, he became accusatory and falsely stated, "I have witnesses that tell me you [shot this man in his car]. I have witnesses that identify you, positively identify you." CAT 119. Gardner further intimidates Jacoby by accusing him of another shooting. CAT 119-20.

It is clear that Jacoby was particularly susceptible to the coercive and intimidating tactics used by the police. Jacoby, who is black, was, at the time of questioning, eighteen years old, CAT 61, and had completed only his sophomore year of high school, CT 721. He was slight of stature: only five feet, five inches tall and weighing 130 pounds. CAT 61. He was

suffering from a cold when the police were interrogating him. CAT 164.[10] As Gardner said, it was clear Jacoby was scared. Jacoby cried, "I -- I want to see my son. I want to be there with my son. I don't want to -- . . . spend the rest of my life in jail." CAT 136. Gardner told Jacoby he was facing a life sentence. CAT 140. Cf., United States v. Tinale, 658 F.2d 1332, 1336-37 (9th Cir. 1981) (confession was involuntary when police recited maximum penalty for crimes of which defendant suspected, told suspect she would not see her two-year-old child "for a while" and that it would be in her best interest to cooperate, which cooperation would be communicated to prosecutor); United States v. Eccles, 850 F.2d 1357, 1360-61 (9th Cir. 1988) (confession was involuntary when FBI agent frightened suspect by telling her her life was in danger, and promised her protection of Witness Protection Program for her and her daughter).

Jacoby's attorney filed a pretrial motion to suppress the

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10. He was also interrogated in turn by another detective, Toni Winfield. CAT 140.

jailhouse interrogation. During oral argument on the motion, the prosecutor acknowledged that "after a certain point in the interview, there is an express or implied promise of leniency that makes the rest of the statement beyond that point inadmissible." RT 25. She stated that she would not be offering that portion of the statement following line fourteen of page ninety-two (CAT 151) of the transcript.[11/]" The state trial court agrees that "it's after that point in each of these transcripts [referring also to the transcript of the interrogation of co-defendant Mario Lawson] the inadmissible conduct occurs on the part of the interviews [sic]," RT 44 (emphasis added), and the court denied the motion to suppress as to that portion of the statement memorialized in pages one to ninety-two. RT 46. This ruling cannot be squared with the evidence. There is nothing materially different about the coercive and intimidating tactics the police used following page 92 in the transcript than the tactics employed before that point. Nor

11. She did clarify that she intended to offer the statement until that point "for all purposes." RT 26.

did the court offer any precedent for the proposition that part of the statement was admissible while part was not. In fact, "[t]he coerced confession cases, from Bram through Miranda and its progeny, consistently indicate that the failure of the defendant to remain silent does not end the analysis, and that the protection against self-incrimination afforded by the constitutional privilege extends to the exclusion of prior answers when they are involuntarily given." Garner v. United States, 501 F.2d 228, 242 (9th Cir. 1972) (en banc, Koelsch, J. dissenting), atf 'd, 424 U.S. 648 (1976).

The admission of an involuntary statement is reviewed for harmless error. Arizona v. Fulminante, 499 U.S. 279, 310-12 (1991). In determining whether the error was harmless beyond a reasonable doubt, the federal habeas court applies the Brecht standard and must grant the writ when the error has a "'substantial and injurious effect or influence in determining the jury's verdict.'" Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (quoting Kotteakos v. United States,

328 U.S. 750, 776 (1946)). As Justice Stevens, who provided the fifth vote for the 5-4 majority in Brecht, explained, this standard is "appropriately demanding"; it requires the prosecutor to shoulder the burden to explain why the errors were harmless and the federal court to examine the entire record *de novo* to determine whether the errors influenced the jury's deliberations, and leaves considerable latitude for the exercise of judgment by federal courts. Brecht, 507 U.S. at 640 (Stevens, J. concurring in judgment).

The error in admitting Jacoby's involuntary statement was not harmless, and did in fact have a substantial and injurious effect on the jury's verdict. When this court reviews the cross-examination of Jacoby, it will see that the prosecutor skillfully and repeatedly used many of Jacoby's involuntary statements from the interrogation to impeach his trial testimony.[12/] From matters as basic as how long Jacoby had known his friends, RT 1031-33, and whether LaDonna Harris

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12. See CT 1031, 1033, 1039, 1040, 1046, 1049, 1052, 1062, 1092, 1109, 1110, 1115, 1116, 1119, 1122, 1123, 1124, 1128, 1134, 1136.

was his girlfriend, RT 1040, to matters concerning the shooting itself, such as whether Jacoby told the police that he saw someone with a gun, RT 1092-93, the prosecutor successfully destroyed Jacoby's credibility. She had him repeatedly admitting that he lied to the police and withheld important information from them. This was a case where the defendant's credibility was crucial. The eyewitnesses to the shooting could not identify the perpetrators because they wore masks. The centerpiece of the prosecution's case was an interview given by Kenneth Williams to the police in which Williams says he heard Jacoby and others planning to rob the victim and that, after the shooting, when he asked Jacoby if he, Jacoby, shot the victim, Jacoby replied, "I think so." At trial, however, Williams consistently denied any memory of his interview with the police, despite being shown videotape excepts in front of the jury. See 12.b, below. The trial essentially became a match of credibility -- the credibility of Jacoby against the credibility of Williams and Nathan Potts, a

snitch who testified in exchange for a promise of no prison time that Jacoby said he was going to shoot a witness to the crime. With Jacoby 's credibility hanging in the balance, it cannot be said that error of admitting his involuntary statements, which were so effectively used to impeach him, was harmless.

The Sixth Amendment provides, in pertinent part, that " [i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence." U.S. Const. amend. VI. Due process guarantees the right to effective assistance of counsel on the first appeal as of right. Evitts v. Lucey, 469 U.S. 387, 396 (1985). To prevail on a Sixth Amendment claim the defendant "must show that counsel's representation fell below an objective standard of reasonableness," and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 688 , 694 (1984). Jacoby was

denied effective assistance of counsel because his appellate attorney inexplicably failed to raise the trial court's error in admitting the involuntary statement as a ground for appeal. But for that error, there is at least a reasonable probability that the appellate court would have reversed Jacoby's convictions and remanded the case for a new trial. See People v. Vasila, 38 Cal.App.4th 865 (1995).

B. Ground Two: The state trial court violated petitioner's right to confront witnesses by admitting into evidence portions of the videotaped interrogation of Kenneth Williams who, at trial, denied any memory of the interview

The factual background of this claim is stated in the opinion of the state appellate court:

> The centerpiece of the prosecution's case was an interview given by Kenneth Williams to Police Detective Toni Winfield, who was investigating Harper's murder. The interview was transcribed and videotaped, and portions of the tape were played during William's testimony.
>
> Williams, who was in custody at the time on a minor unrelated matter, appeared nervous and upset, crying at the beginning of the interview because "I don't want to snitch on my homies [best friends]." He told Winfield

that just before the robbery he overheard Felix, Lawson and third man, Ellis Curtis, planning to "jack the dude" who lived around the corner for some "weed," meaning to rob Harper to obtain marijuana. Felix had an automatic weapon and Curtis had a .38 revolver.

Williams saw the three men go around the corner and about two minutes later he heard six or seven shots ring out. He then observed Curtis and Felix hop into Harper's car and drive off. Williams saw the trio a short time later going through Harper's car. Williams asked Felix whether he had shot Harper, and Felix relied, "I think so."

At trial, Williams consistently denied any memory of the interview with Detective Winfield, despite being shown videotape excerpts in front of the jury.

Slip op. at 4-5 (footnotes omitted). Over defense objections, the trial court allowed the jury to view portions of the videotaped statements. RT 526-31.

The Sixth Amendment provides, in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend VI.[13]/13 This right to confrontation embodies the right to cross-examine adverse witnesses, thereby allowing the

13. The Confrontation Clause of the Sixth Amendment is applicable to the States. Pointer v. Texas, 380 U.S. 400, 406 (1965).

defendant to impeach a witness or to show a witness' possible biases, prejudices, or self-interest in testifying. Davis v. Alaska, 415 U.S. 308, 316 (1974); Chipman v. Mercer, 628 F.2d 528, 530 (9th Cir. 1980), overruled on other grounds, Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986). Because the issue of whether a trial court has violated the Confrontation Clause is a question of law involving the accused's right to a fair trial, review is de novo. Selam v. Warm Springs Tribal Correctional Facility, 134 F.3d 948, 951 (9th Cir. 1998).

Some courts have held that "when a witness is wholly unable to testify on direct examination by the state because of a claimed loss of memory, the state should not be permitted to introduce prior statements of the witness as substantive evidence because of the lack of the ability to cross-examine the witness at trial." Creekmore v. Dist. Court of Eighth Judicial District, 745 F.2d 1236, 1237 (9th Cir. 1984) (citing United States v. Palumbo, 639 F.2d 123, 128 n. 6 (3d Cir.),

cert. denied, 454 U.S. 819 (1981); United States v. Classen, 424 F.2d 494, 495 (6th Cir. 1970)). The Ninth Circuit, however, has not had occasion to address the issue. Creekmore, 745 F.2d at 1237 (holding no Sixth Amendment violation when witness testified fully on direct, was extensively crossed, and lapse of memory related to only one aspect of her testimony).

In Douglas v. Alabama, 380 U.S. 415 (1965), the Court broadly held that present yet unresponsive witnesses are unconfrontable. Id. at 419-20. In that case, an alleged accomplice was called as a witness by the state, but when the prosecutor asked about a purported confession he had given the police, he refused to answer. The court declared him a hostile witness and permitted the prosecutor to read from the confession and ask the accomplice, after every few sentences, "Did you make that statement?" Id. at 416. This violated the Sixth Amendment, the Supreme Court explained, because "[s]ince the [prosecutor] was not a witness, the inference

from his reading that [the accomplice] made the statement could not be tested by cross-examination. Similarly, [the accomplice] could not be cross-examined on a statement imputed to but not admitted by him." Id. at 419.

Similarly, in this case, effective confrontation of Williams was impossible because he refused to affirm his unsworn statement to Winfield.[14/] As discussed above, this case came down to a swearing match between Jacoby, on the one hand, and Williams (and, to a lesser degree, Potts) on the other. The unsworn statement of Williams to Winfield, which Williams, once under oath abandoned at trial, was, in the words of the state appellate court, "[t]he centerpiece of the prosecution's case." Slip op. at 4. Thus, just as in Douglas,

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14. See, e.g., cross examination of Williams at RT 561-62:

Q Do you remember when you told that story to Winfield about seeing the guns, you said that you saw them [i-e., Ellis Curtis and Jacoby] when they were going down around the corner?

A No.

. . . .

Q In fact, you don't remember anything, do you?

A No.

"[t]he alleged statements clearly bore on a fundamental part of the State's case against petitioner. The circumstances are therefore such that inferences from a witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant." Douglas, 380 U.S. at 420 (internal quotes omitted). Accordingly, the state trial court's admission of the videotaped statement of Williams deprived Jacoby of his Sixth Amendment right of confrontation.[15/]

13. **If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or**

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15. In United States v. Owens, 484 U.S. 554 (1988), the Court held that the defense's opportunity to cross-examine an amnesic victim was adequate to satisfy confrontational requirements even if the cross-examination proved less satisfying than it might have otherwise. Id. at 559. In that case, the defendant, a prisoner, was convicted of beating a prison guard. The guard, who from his hospital bed was able to identify the prisoner as the assailant shortly after the assault, was unable to do so at trial, although he did recall making the identification while in the hospital. The Owens court was careful to note, however, that the defense had available to it a potentially effective line of cross-examination because the guard was able to recall the identification, thus permitting an inquiry into the circumstances under which the statement was made. Id. at 560. This line of inquiry is unavailable when, as here, the witness' asserted inability to remember extends not only to the content, but to the making of the statement. Moreover, Douglas, a case Owens did not purport to overrule, is controlling here where Williams' "memory loss" was clearly feigned. See slip op. at 9.

federal, state briefly what grounds were not so presented, and give your reasons for not presenting them.

The ground listed in 12A was raised in the state trial court, but was not previously presented to the state appellate courts because of the ineffectiveness of appellate counsel, as discussed above.

14. **Do you have any petition or appeal now pending in any court as to the judgment under attack?** No

15. **Give the name and address, if known, of each attorney who represented you in the following states of the judgment attacked herein:**
    (a) **At preliminary hearing:** Mark D. Millard, 901 H Street, Suite 502 Sacramento, CA 95814-1809
    (b) **At arraignment and plea:** Same
    (c) **At trial:** Same
    (d) **At sentencing:** Same
    (e) **On appeal:** Mark D. Greenberg, 484 Lake Park Avenue, Suite 429, Oakland, CA 94610
    (f) **In any post-conviction proceeding:** In propria persona
    (g) **On appeal from any adverse ruling in post-conviction proceedings:** N/A

16. **Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?** Yes.

17. **Do you have any future sentence to serve after you complete the sentence imposed by judgment under attack?** No

PRAYER FOR RELIEF

Wherefore, petitioner prays that the Court issue the writ of habeas corpus and grant petitioner all other relief to which he may be entitled in this proceeding.

Dated: January 20, 1999

Respectfully submitted,

QUIN DENVIR
Federal Defender

/s/
DAVID M. PORTER
Assistant Federal Defender

Counsel for Petitioner
JACOBY LEE FELIX

I state under penalty of perjury that the foregoing is true and correct.

Executed in Soledad, California, on this 22 of January, 1999

/s/
JACOBY LEE FELIX
Petitioner

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Attorneys for Petitioner
JACOBY LEE FELIX

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JACOBY LEE FELIX, Petitioner, v. DENEICE A. MAYLE, Warden, Respondent, BILL LOCKYER, Attorney General, Additional Respondent,	CIV S 98-0828 WBS GGH P **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that she is an employee in the Office of the Federal Defender for the Eastern District of California and is a person of such age and discretion as to be competent to serve papers.

On February 1, 1999, she personally served a copy of the attached **AMENDED PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254** upon respondent by delivery to respondent's counsel as follows:

[Cert. of Service cont'd]

BY MAIL, POSTAGE PRE-PAID

Mathew Chan
Attorney General
P.O. Box 944255
1300 I Street, Suite 1101
Sacramento, CA 95844-2550

Dated: January 29, 1999 /s/

APPENDIX J

THE COURT: Mr. Brakowiecki?

MR. BRAKOWIECKI: Nothing further, your Honor.

HE COURT: Is the witness excused?

MR. MILLARD: Subject to recall.

THE COURT: All right, Mr. Straughter, you're free to leave if you wish. If you're going to be recalled, the attorneys will contact you.

Next witness.

MS. MCGUIRE: Kenneth Williams.

THE CLERK: Stand there, sir, and raise your right hand to be sworn.

Do you solemnly swear that the testimony you may give in the matter now pending before this Court today shall be the truth, so help you God?

THE WITNESS: I do.

THE CLERK: Please be seated in the witness chair. State your name and spell your last name for the

record.

THE WITNESS: Kenneth Williams. W-i-1-1-i-a-m-s.

THE CLERK: Thank you.

TESTIMONY OF

KENNETH WILLIAMS, witness called on behalf of the People herein:

DIRECT EXAMINATION

BY VALERIE L. MCGUIRE, DEPUTY DISTRICT ATTORNEY:

Q Is there some gum in your mouth?

A (Nodded head) .

Q Because you need to testify, so would you throw

that away so we'll be able to understand what you say when you testify, please?

A (Complied).

Q Thank you.

Morning, Kenneth.

A Good morning.

Q Mr. Williams, do you know Jacoby Felix?

A Yeah.

MS. MCGUIRE: Can everyone hear him?

THE COURT: Mr. Williams, you need to keep your voice up so they can hear you.

THE WITNESS: Yeah,

Q (By Ms. McGuire): How is it that you know him?

A We used to go to school together.

Q Are you friends?

A Yes.

Q How long have you and Jacoby Felix been friends?

A Too long.

Q Too long for what?

A Long time.

Q Are you good friends with him?

A Yes.

Q Do you want to testify against him in this case?

A No.

Q Have you told me that?

A Yes.

Q One time or more than one time?

A A long time.

MR. MILLARD: Well, objection, your Honor.

What is someone else's -- it's hearsay. It's

irrelevant.

THE COURT: Overruled.

It goes to his attitude.

Q (By Ms. McGuire) : Why is it that you don't want to

testify against him?

A Because he's my friend.

Q Do you know Mario Lawson?

A Yes.

Q How is it that you know Mario Lawson?

A We just go to school together, too.

Q Is he your friend?

A Yes.

Q How long have you been friends with him?

A Since we've been growing up.

Q Do you want to testify against him?

A No.

Q And why is that?

A Because he's my friend.

Q Are you here in court today because you want to be

here?

A No. Because they ordered me back here.

Q Is that the only reason that you're in court today?

A Uh-huh.

Q You have to say yes or no --

A Yes.

Q -- so the Court Reporter can take it down, please.

How old are you?

A 21.

Q Do you remember how old you were when you met Jacoby Felix?

A Nah-ah.

Q In 1993, what area of Sacramento did you live in?

A Oak Park.

Q How long had you been living in Oak Park?

A Sixteen years, seventeen.

Q What street did you live on?

A 36th Street.

Q And in September of 1993, do you remember what your address was or what street you lived on then?

A Nah.

Q Was it a house or an apartment?

A A house.

Q Was it located somewhere near the Shiloh Arms Apartment Complex --

A Nah-ah.

Q -- in September of '93?

A I don't know. I don't remember.

Q Who did you live with at that time?

A My mom, auntie.

Q Is your mom's name Tina?

A Yes.

Q Is your aunt's name Sadie?

A Yes.

Q Did you live with them in a house on 22nd Avenue?

numbers had been scratched off?

A Yes, it was.

Q On the 28th of October, 1993, was Jacoby Felix at the Sacramento Police Department?

A Yes, he was.

Q And why was he at the Sacramento Police Department?

A He had been asked to come down to the Police Department to be interviewed as part of this investigation.

Q And did he agree to do so?

A Yes, he did.

Q And was he in custody when he was brought down?

A No, he was not.

Q And where was he when you were getting ready to interview him or when you were -- before he was interviewed?

A He was sitting in the lobby area which is a -- kind

of an area that's between the main lobby of the upstairs, second floor of the Hall of Justice, and this lobby area leads from the main lobby area into the Homicide Unit.

Q And then prior to this interview, was he placed in the holding cell?

A Yes, he was.

Q And then was he interviewed in one of the Homicide Division interview rooms?

A Yes, ma'am.

Q And prior to the start of your interviewing him, did you attempt to get some background information from

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Q And what was the date of that interview?
A Um, January 5th of '94.
Q Had you been trying to interview him sooner than that?
A Yes.
Q Did you interview someone named Kenneth Williams on this case?
A Yes.
Q What was the date of that interview?
A February 4th of '94.
Q And was he in custody at the time you interviewed him?
A Yes.
Q Where was he brought from?
Well, excuse me.
Where was that interview conducted at?
A At the Homicide Division interview room downtown.

Q Was it videotaped?
A Yes.
Q And where was he brought from for that interview?
A The Rio Cosumnes Correctional Center in Elk Grove.
Q Prior to him being brought there, had he requested to be brought there?
A No, not at all.
Q Had he asked for any consideration on the case that he was in custody for?
A No.
Q What was he in custody for at that time?

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A A misdemeanor. He had a few more days to serve.
Q Did you --
Did he have a few more days because of some consideration you had given him?
A No.

Q Did you give him any consideration or try to get any time or anything for him because he was brought down and you took a statement from him?

A No.

Q At the time of your interview, was he to your knowledge on drugs of any type?

A No. He had been in custody for some time.

Q When, if you know, was he first brought into custody?

A 1-13-94, I believe.

Q January 13th?

A Yes.

Q Did you threaten him to get him to give you a statement?

A Not at all.

Q Did you promise him anything to get him to give you a statement?

A No.

Q On February 4th of 1994, was he a suspect in this case?

A No.

Q And had he been at some point a suspect in the robbery and murder of Richard Harper?

A No.

Q Did you tell him during the course of your interview that he was not a suspect in this case?

A Absolutely. Yes, I did.

Q What was his demeanor when you interviewed him?

A He was very frightened, very nervous, highly upset that I was questioning him about this.

Q Did you ask him what he was frightened of to determine if he was frightened of you?

A No, I didn't ask him what he was frightened of. It was apparent to me that he was very nervous and very

scared, and he expressed why he didn't want to be there.

Q And what was the reason he didn't want to be there?

MR. MILLARD: I'm going to object, your Honor Calls for inadmissible hearsay.

MR. BRAKOWIECKI: Joined.

THE COURT: Well, I believe it's a prior inconsistent statement.

MR. MILLARD: Inconsistent to what?

He testified to that point.

THE COURT: His remarkable failure of recollection at that time.

MR. MILLARD: Okay.

THE WITNESS: He did not want to snitch on his homeys.

MR. MILLARD: I'm going to object and move to strike that, your Honor. That's a conclusion. That's not the

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DENEICE A. MAYLE, Warden, *Petitioner,*

v.

JACOBY LEE FELIX, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CERTIFICATE OF SERVICE

I, Mathew Chan, a member of the Bar of this Court, hereby certify that on this 25th day of October, 2004, a copy of Petition For Writ Of Certiorari, in the above-captioned case by personally delivering to the following person at the address as follows:

David M. Porter
Assistant Federal Defender
Office of the Federal Defender
801 I Street, 3rd Floor
Sacramento, CA 95814
(916) 498-5700

(Counsel for Respondent - Jacoby Lee Felix, 3 copies)

All persons required to be served have been so served.

Dated: October 25, 2004

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